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No.

In the Supreme Court of the United States

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether all of the evidence seized pursuant to search warrants should be suppressed under the exclusionary rule, where the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and where the executing officers seized a substantial volume of items not covered by the warrants.

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PETITION FOR A WRIT OF CERTIORARI

Pradeep Srivastava respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 540 F.3d 277. The opinion of the district court granting petitioner's motion to suppress (App., *infra*, 33a-83a) is reported at 444 F. Supp. 2d 385. The opinion of the district court denying respondent's motion for reconsideration (App., *infra*, 84a-94a) is reported at 476 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2008. A petition for rehearing was denied on October 14, 2008 (App., *infra*, 32a). On December 31, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 2009, and on January 29, 2009, he further extended the time to and including March 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. Petitioner is a cardiologist living in Potomac, Maryland. In 2003, the federal government, through the Department of Health and Human Services (HHS) and other agencies, began investigating whether petitioner had submitted fraudulent claims to health-care benefit programs, in violation of 18 U.S.C. 1347. As part of that investigation, Jason Marrero, an HHS special agent, applied for warrants to search petitioner's home and two offices. On March 20, 2003, a magistrate judge issued the warrants. The warrants authorized agents to search for "[t]he following records including, but not limited to,

financial, business, patient, insurance and other records related to the business of [petitioner] * * *, for the period January 1, 1998, to Present, which may constitute evidence of violations of [18 U.S.C. 1347]." The warrants proceeded to authorize the seizure of various specific categories of records, including, as is relevant here, "[f]inancial records, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other records reflecting income and expenditures of the business." App., *infra*, 1a-6a, 35a-37a.

The following day, federal agents, led by Agent Marrero, simultaneously executed the warrants. The agents seized substantial volumes of documents from each location; from petitioner's home, the agents seized, *inter alia*, copies of the personal tax returns for petitioner and his wife; their personal bank and brokerage records; papers concerning petitioner's summer home; unopened personal mail; an invitation to a cultural event; petitioner's wallet; his credit cards; a CVS Pharmacy loyalty card; an American Automobile Association card; and some foreign currency. During the search of one of petitioner's offices, agents also seized copies of records indicating that petitioner had transferred large sums of money to a bank in India. App., *infra*, 7a-8a, 37a-38a.

Agent Marrero testified that he viewed the limiting language in the warrants as "just an expression" and a "go by" and that he did not believe that it restricted his actions in any way. He further testified that he did not consider himself to be limited to seizing only business records and that he intended to seize personal financial records as well. After petitioner's counsel complained to the United States Attorney's Office that the executing officers had seized items outside the warrants' scope, the government returned about 80% of the materials that

had been seized from petitioner's home; the returned materials filled several large boxes. App., *infra*, 50a-56a.

In the wake of the searches, the government did not pursue any criminal charges against petitioner for health-care fraud.[1] Agent Marrero, however, shared the seized Indian bank records with the U.S. Attorney's Office. In conjunction with the Internal Revenue Service, the U.S. Attorney's Office then began an investigation into whether petitioner had committed *tax* fraud, eventually concluding that petitioner had underreported capital gains for tax years 1998 and 1999. App., *infra*, 8a-9a, 38a-39a.

2. On October 12, 2005, a grand jury in the District of Maryland indicted petitioner on two counts of attempting to evade taxes, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). Petitioner moved to suppress all of the documents seized during the searches, including tax returns and other tax-related documents seized from his home, as well as the Indian bank records seized from one of his offices (which, while not directly relevant to the instant charges, had initially triggered the tax-fraud investigation). See App., *infra*, 10a-12a (listing key documents).[2]

After conducting an evidentiary hearing at which Agent Marrero testified, the district court granted peti-

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[1] Without conceding any wrongdoing, petitioner did enter into a civil settlement with the government on similar charges. See App., *infra*, 34a n.2; Gov't C.A. Reply Br. 4-5 & n.1.

[2] Petitioner also requested an evidentiary hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), on the ground that Agent Marrero's affidavit in support of the warrant application had contained material omissions. The district court, however, denied petitioner's request. See App., *infra*, 34a.

tioner's motion to suppress. App., *infra*, 33a-83a. With regard to the documents that the government was planning to introduce at trial, the district court first held that those documents fell outside the scope of the warrant. *Id.* at 41a-49a. The court reasoned that the documents at issue "neither tended to show violations of the health care fraud statute[] nor related to the business of [petitioner]." *Id.* at 46a-47a. The court observed that "[t]he fact that officers executing the search warrants in this case were faced with many personal records does not excuse them from complying with the restrictions and qualifications listed in the warrant." *Id.* at 45a.

As is relevant here, the district court then held that, "[e]ven if * * * some of the documents at issue were within the scope of the warrant, these documents would be excluded as well because the conduct of the agents who executed this warrant was so inappropriate as to warrant the exclusion of *all* evidence seized." App., *infra*, 49a; see *id.* at 49a-58a. The court reasoned that, while the exclusionary rule ordinarily requires only that improperly seized evidence be suppressed, the blanket suppression of all seized evidence is merited where "the officers executing the warrant exhibit a flagrant disregard for its terms." *Id.* at 50a (internal quotation marks and citation omitted).

Applying that principle, the district court first found that, although the warrant contained limitations concerning the subject matter of the records that could have been seized, "[Agent] Marrero approached * * * the search[es] in a way that authorized the seizure of virtually any document of [petitioner]," App., *infra*, 54a, and thereby "flagrantly exceeded the specific limitations of the warrants," *id.* at 57a-58a. "It is clear," the court explained, "that [Agent] Marrero was unequivocal in his belief that the limiting words of the warrant were mean-

ingless to him." *Id.* at 53a-54a. The court characterized Agent Marrero's testimony as "astonishing," *id.* at 50a-51a; "at best[] troublesome," *id.* at 54a; and "alarming," *id.* at 55a. The court further found that "[Agent] Marrero's expansive view of the warrants * * * created a situation where executing agents grossly exceeded the scope of the search warrants." *Id.* at 54a-55a.

The district court stated that it was "mindful that it is a rare situation indeed where agents are found to be so excessive in their execution of a search warrant that blanket suppression is warranted." App., *infra*, 55a. Nevertheless, based on its findings concerning Agent Marrero's interpretation of the warrants and the overbreadth of the searches, the court concluded, "[w]ith great disappointment," that "this rare remedy is appropriate in this case." *Id.* at 56a, 81a.[3]

3. After the government filed an interlocutory appeal, the court of appeals vacated and remanded. App., *infra*, 1a-31a. With regard to the documents that the government was planning to introduce at trial, the court of appeals first held, in disagreement with the district court, that those documents fell within the scope of the warrant. *Id.* at 19a-27a.

As is relevant here, the court of appeals then held that the blanket suppression of the documents seized during the searches was improper. App., *infra*, 28a-30a. At the outset, the court asserted that "only extraordinary circumstances * * * will justify the suppression of lawfully seized evidence." *Id.* at 28a (citation omitted).

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[3] The district court subsequently denied the government's motion for reconsideration. App., *infra*, 84a-94a. In so doing, the court emphasized that, in ordering blanket suppression, it had relied on "the quantity of the materials seized" and "[Agent] Marrero's testimony," and "not simply [on] the interpretation of the text of the warrants and accompanying affidavit." *Id.* at 90a.

The court then summarily concluded that it was "unable to identify any extraordinary circumstances that might support [the district court's] ruling." *Id.* at 29a.

The court of appeals added that, "[e]ven assuming—as the district court found—that Agent Marrero believed that the terms of the search warrants were 'meaningless,' and did not limit his conduct in any way, such an assumption does not support the blanket suppression ruling." App., *infra*, 29a. The court of appeals explained that "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." *Ibid.* "As a result," the court continued, "the subjective views of Agent Marrero were not relevant—the proper test is an objective one." *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463 (1985), and *Martin* v. *Gentile*, 849 F.2d 863 (4th Cir. 1988)). Although the court of appeals expressed "sympath[y] with the [district] court's view that [Agent] Marrero's testimony was disconcerting," it concluded that "his personal opinions were an improper basis for the blanket suppression ruling." *Id.* at 30a.[4]

4. Petitioner filed a petition for rehearing, which was denied without recorded dissent. App., *infra*, 32a.

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[4] In a footnote, the court of appeals concluded that the district court had erred by citing the government's subsequent return of large quantities of materials seized from petitioner's home as evidence of the overbreadth of the searches. App., *infra*, 30a n.20. The court of appeals reasoned that "the voluntary return of property seized under a valid warrant does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Fourth Circuit concluded in this case that the blanket suppression of evidence seized pursuant to search warrants was improper, notwithstanding the district court's findings that the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and that the executing officers seized a substantial volume of items not covered by the warrants. In so concluding, the Fourth Circuit held that the subjective views of the officers were irrelevant for purposes of determining whether the officers had acted with "flagrant disregard" for the terms of the warrants (and thus whether blanket suppression was required under the exclusionary rule). The court of appeals' decision deepens a conflict among the federal courts of appeals and state courts of last resort concerning the validity and application of the "flagrant disregard" doctrine, and it cannot be squared with this Court's decisions concerning the scope of the exclusionary rule more generally. This case, moreover, constitutes an ideal vehicle for the Court to clarify the standards for the invocation of the "flagrant disregard" doctrine—one of the most important aspects of the exclusionary rule that the Court has yet to address. Further review is therefore warranted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort Concerning The Validity And Application Of The "Flagrant Disregard" Doctrine

The Fourth Circuit held in this case that the subjective views of the supervising officer were irrelevant for purposes of the application of the "flagrant disregard" doctrine. See App., *infra*, 29a-30a. The lower courts are in substantial disagreement as to the relevance of officers' subjective views to the analysis, with some courts

holding that they are relevant, others holding that they are not, still others taking an agnostic or ambiguous position, and still others refusing to recognize the "flagrant disregard" doctrine at all. All of the federal courts of appeals with jurisdiction over criminal matters, moreover, have now spoken to the issue in some manner. The resulting disarray merits the Court's review.

1. Three circuits—the District of Columbia, Ninth, and Tenth—have explicitly considered officers' state of mind in determining the applicability of the "flagrant disregard" doctrine. See *United States* v. *Heldt*, 668 F.2d 1238 (D.C. Cir. 1981) (per curiam), cert. denied, 456 U.S. 926 (1982); *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (Kennedy, J.); *United States* v. *Foster*, 100 F.3d 846, 850 (10th Cir. 1996). In *Rettig* and *Heldt*—the two seminal cases for the proposition that there are circumstances under which "the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed," *Waller* v. *Georgia*, 467 U.S. 39, 43 n.3 (1984)—the courts framed the standard for blanket suppression in terms of the officers' state of mind. In *Rettig*, the Ninth Circuit heavily relied on the fact that, while the warrant in question allowed the officers to search for evidence of marijuana dealing, the officers had obtained the warrant only as a pretext to search for evidence of *cocaine* smuggling. See 589 F.2d at 421-422. After noting "the breadth of the search that took place," *id.* at 421, and "[the officers'] intent to conduct a search the purposes and dimensions of which are beyond that set forth in the [warrant application]," *id.* at 423, the court concluded that the warrant, "[a]s interpreted and executed by the agents, * * * became an instrument for conducting a general search." *Ibid.* And in *Heldt*—which first referred to the "flagrant disregard" doctrine, 668

F.2d at 1259—the District of Columbia Circuit explained that, while the relevant inquiry focuses on "the reasonableness of [the] search," *id.* at 1260, "the reasonableness of the execution of the search can be determined from the *subjective and objective* behavior of the participants during the search." *Id.* at 1268 (emphasis added). The court concluded that, in that case, there was "no persuasive evidence that the search was merely a subterfuge to examine or seize other evidence not specified in the warrant," *ibid.*, and thus held that blanket suppression was inappropriate, *id.* at 1269.

In its subsequent decision in *Foster*, the Tenth Circuit even more explicitly tied the standard for blanket suppression to a finding concerning the officers' state of mind. In that case, the court determined, based on testimony from the executing officers, that the officers "viewed the warrant [at issue] as a general warrant and executed the warrant in accord with those views." 100 F.3d at 850. The court upheld the suppression of the evidence at issue, on the ground that "the officers' disregard for the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing." *Id.* at 851. Notably, the court made clear that the "flagrant disregard" doctrine was applicable not only when officers *obtained* a warrant in bad faith, but when they *executed* it in bad faith as well. See *ibid.*

At least one state court of last resort has likewise considered officers' state of mind in applying the "flagrant disregard" doctrine. In *State* v. *Valenzuela*, 536 A.2d 1252 (1987) (Souter, J.), cert. denied, 485 U.S. 1008 (1988), the New Hampshire Supreme Court noted that the executing officers had "improperly seized and removed voluminous papers for later examination into possible evidentiary value." *Id.* at 1267. The court never-

theless held that the "flagrant disregard" doctrine was inapplicable, based on the trial court's findings that "the dominant concern of the officers was to find the evidence they were authorized to seize" and that "execution of the warrant was no mere subterfuge for a general search." *Ibid.*

2. By contrast, like the Fourth Circuit in this case, three other circuits—the Third, Sixth, and Eighth—have looked only to objective factors, without reference to officers' actual state of mind, in determining the applicability of the "flagrant disregard" doctrine. In *United States* v. *American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (1989), cert. denied, 493 U.S. 955 (1989) and 493 U.S. 1021 (1990), the Third Circuit stated that an "objective standard govern[ed] the evaluation of the officers' conduct in executing the warrant," *id.* at 1107, and "rel[ied] on [the] conclusion that the agents acted in objective good faith" in holding that the "flagrant disregard" doctrine was inapplicable, *ibid.* Similarly, in *United States* v. *Garcia*, 496 F.3d 495 (6th Cir. 2007), and *United States* v. *Decker*, 956 F.2d 773 (8th Cir. 1992), the courts focused only on objective considerations—and, indeed, seemingly took the position that the "flagrant disregard" doctrine applies only where officers searched *places* not authorized by the warrant (and not where, as here, officers seized unauthorized *items*). See *Garcia*, 496 F.3d at 507; *Decker*, 956 F.2d at 779.[5]

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[5] In *Foster*, *supra*, the government unsuccessfully argued in a petition for rehearing that the "flagrant disregard" doctrine applies only where officers searched places not authorized by the warrant. See 104 F.3d 1228, 1229 (10th Cir. 1997). In other briefs, however, the government has conceded that the doctrine also applies where officers seized unauthorized items. See, *e.g.*, Gov't Br. at 27-28, *United States* v. *Khanani*, 502 F.3d 1281 (11th Cir. 2007) (Nos. 05-11689-BB & 05-15014-BB).

Some state courts of last resort also have looked only to objective factors in applying the "flagrant disregard" doctrine. For example, in *State* v. *Jacobs*, 10 P.3d 127 (2000), the New Mexico Supreme Court held that officers did not "grossly exceed the scope of the warrant" by seizing two items not specified in the warrant (at least one of which, according to the court, officers "reasonabl[y]" could have believed "was related to the crime being investigated"). *Id.* at 141. And in *State* v. *Petrone*, 468 N.W.2d 676, cert. denied, 502 U.S. 925 (1991), the Wisconsin Supreme Court upheld the admission of evidence on the ground that the executing officers "did not seize items that were not arguably connected in some way with the illegal activity described in the warrant." *Id.* at 683.

3. Three other circuits—the First, Second, and Eleventh—either have expressly left open the relevance of officers' state of mind in determining the applicability of the "flagrant disregard" doctrine, or have taken ambiguous positions on the issue. For its part, the Second Circuit has announced a two-part test for the applicability of the "flagrant disregard" doctrine, under which blanket suppression is appropriate when (1) officers "effect a widespread seizure of items that were not within the scope of the warrant" and (2) officers "do not act in good faith." *United States* v. *Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (internal quotation marks and citation omitted), cert. denied, 534 U.S. 816 (2001). Because the Second Circuit determined in *Liu*, however, that the search at issue was not overbroad for purposes of the first prong of its test, it explicitly left open "the question of whether the proper approach to 'good faith' in this context is objective or subjective." *Id.* at 142.

The law in the First and Eleventh Circuits is less clear. In *United States* v. *Young*, 877 F.2d 1099 (1989)

(Breyer, J.), the First Circuit explained that blanket suppression would be warranted where "the lawful part [of a search] seems to have been a kind of pretext for the unlawful part." *Id.* at 1105-1106 (citing, *inter alia*, *Rettig*, 589 F.2d at 423). In its subsequent decision in *United States* v. *Hamie*, 165 F.3d 80 (1999), however, the First Circuit focused more on the extent of overbreadth of the search in determining that the "flagrant disregard" doctrine was not applicable. See *id.* at 84 (concluding that the seized evidence that fell outside the scope of the warrant "was a very small tail on a very large dog"). Similarly, in *United States* v. *Wuagneux*, 683 F.2d 1343 (1982), cert. denied, 464 U.S. 814 (1993), the Eleventh Circuit stated that blanket suppression would be appropriate under the "flagrant disregard" doctrine only where "the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions." *Id.* at 1354. More recently, however, in *United States* v. *Khanani*, 502 F.3d 1281 (2007), the Eleventh Circuit seemingly relied on the state of mind of the executing officers, citing the district court's finding that the officers had "made efforts" not to seize items outside the warrant's scope. *Id.* at 1290.

4. Finally, two other circuits—the Fifth and Seventh—have refused to recognize the "flagrant disregard" doctrine at all. In *United States* v. *Willey*, 57 F.3d 1374, cert. denied, 516 U.S. 1029 (1995), the Fifth Circuit declared that it had "not adopted the flagrant disregard exception" to the general principle that items properly seized pursuant to a valid warrant are admissible. See *id.* at 1390 n.31. And in *United States* v. *Buckley*, 4 F.3d 552 (1993), cert. denied, 510 U.S. 1124 (1994), the Seventh Circuit, despite citing the Ninth Circuit's decision in *Rettig*, ultimately rejected the "flagrant disregard" doctrine. See *id.* at 557-558. The court stated that, "[i]f the

defendants in this case wish for suppression of all of the evidence, they must assert that *all* of the evidence was beyond the scope of the warrant." *Id.* at 558 (emphasis added). At least one state court of last resort, moreover, has declined to recognize the "flagrant disregard" doctrine, on the ground that this Court has not yet done so. See *Klingenstein* v. *State*, 624 A.2d 532, 537 (Md.), cert. denied, 510 U.S. 918 (1993). There is therefore a substantial conflict not only as to the relevance of officers' subjective views to the application of the "flagrant disregard" doctrine, but also as to the validity of the "flagrant disregard" doctrine as a basis for suppression in the first place. The resulting disuniformity, on a fundamental aspect of the exclusionary rule, merits this Court's review.

B. The Decision Below Is Inconsistent With This Court's Decisions Concerning The Exclusionary Rule

In addition to deepening a circuit conflict concerning the validity and application of the "flagrant disregard" doctrine, the decision below cannot be reconciled with this Court's decisions concerning the exclusionary rule more generally. Further review is warranted on that basis as well.

1. This Court has considered the "flagrant disregard" doctrine on only one occasion. In *Waller* (which primarily concerned the question whether the Sixth Amendment right to a public trial extended to a suppression hearing, see 467 U.S. at 44-47), the Court addressed in a footnote the petitioners' contention that officers had "so 'flagrant[ly] disregard[ed]' the scope of the warrants in conducting the seizures at issue * * * that they turned the warrants into impermissible general warrants." *Id.* at 43 n.3. The Court recognized that the decisions in *Rettig* and *Heldt* stood for the proposition that "in such circumstances the entire fruits of the search,

and not just those items as to which there was no probable cause to support seizure, must be suppressed." *Ibid.* But the Court ultimately (and "summarily") concluded that, because the petitioners had alleged only that the officers "unlawfully seized and took away items unconnected to the prosecution," there was "no requirement that lawfully seized evidence be suppressed as well." *Ibid.* In *Waller*, therefore, the Court held at most that the "flagrant disregard" doctrine was inapplicable on the facts of that case, without definitively resolving any question concerning the validity or scope of that doctrine.

2. As a matter of first principles, it is clear that the "flagrant disregard" doctrine constitutes a valid application of the exclusionary rule. As lower courts recognizing that doctrine have noted, "[t]he cornerstone of the * * * doctrine is the enduring aversion of Anglo-American law to so-called general searches," and "[t]he rationale for blanket suppression is that a search that greatly exceeds the bounds of a warrant and is not conducted in good faith is essentially indistinguishable from a general search." *Liu*, 239 F.3d at 140-141; see, *e.g.*, *Heldt*, 668 F.2d at 1257 (noting that, "[w]hen investigators fail to limit themselves to the particulars in the warrant, both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity"). To put the point another way, when an officer seizes items (or searches places) with "flagrant disregard" for the warrant's relevant limitations as to the items to be seized (or places to be searched), it is as if those limitations never existed in the first place. Although items properly seized pursuant to a valid warrant are ordinarily admissible, the blanket suppression of evidence in cases involving the "flagrant dis-

regard" of a warrant's terms properly serves the "primary justification" for the exclusionary rule: *viz.*, to "deter[] * * * police conduct that violates Fourth Amendment rights." *Stone* v. *Powell*, 428 U.S. 465, 486 (1976).

3. In this case, the court of appeals correctly recognized the existence of the "flagrant disregard" doctrine—and, indeed, correctly recognized that the doctrine applies only in "extraordinary circumstances." See App., *infra*, at 28a. The court of appeals erred, however, in two critical respects.

a. The court of appeals primarily erred by holding that "the subjective views of [the supervising officer] were not relevant" in determining the applicability of the "flagrant disregard" doctrine. App., *infra*, 29a; see pp. 8-14, *supra*. In so holding, the court improperly conflated the question whether a Fourth Amendment violation had occurred with the question whether the suppression of evidence was warranted under the exclusionary rule. As to the former question, it is settled law, as the court of appeals noted, that "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable." *Id.* at 29a; see, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (noting that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

As to the latter question, however, this Court has consistently emphasized that "the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *Scott* v. *United States*, 436 U.S. 128, 139 n.13 (1978); see, *e.g.*, *United States* v. *Leon*, 468 U.S. 897, 911 (1984) (noting that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" in determining whether to apply the exclusionary rule). As recently as earlier this Term, the

Court reiterated that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009). The significance of an officer's intent to the application of the exclusionary rule is entirely understandable. Whereas the touchstone of the Fourth Amendment is reasonableness, the touchstone of the exclusionary rule is *deterrence*—and meaningful deterrence is not possible where "the official action was pursued in complete good faith." *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974); see *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) (noting that the exclusionary rule is "most likely" to be an effective deterrent when "official conduct was flagrantly abusive of Fourth Amendment rights").

This Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), highlights the relevance of an officer's intent to the exclusionary-rule inquiry. In *Franks*, the Court held that the exclusionary rule requires the suppression of evidence seized pursuant to a warrant that was issued based on an affidavit containing either "deliberate[ly] false[]" statements or statements made in "reckless disregard for the truth." *Id.* at 171. In so holding, the Court noted that it "ha[d] not questioned * * * the continued application of the [exclusionary] rule to suppress evidence * * * where a Fourth Amendment violation has been substantial and deliberate." *Ibid.* And the Court explained that it would be an "unthinkable imposition upon [a magistrate's] authority" if an officer could intentionally or recklessly falsify statements in an affidavit and obtain a search warrant based on those statements, yet retain the ability to use evidence obtained from the ensuing search (and, "having misled the

magistrate," thereby "remain confident that the ploy was worthwhile"). *Id.* at 165, 168. So too here, where an officer acts with disregard for the limitations in a search warrant (and in fact seizes a substantial amount of evidence outside the scope of the warrant), the suppression of all of the seized evidence is justified.

To be sure, this Court has "perhaps confusingly" stated that, although an officer's "good faith" (or lack thereof) is relevant to the exclusionary-rule inquiry, good faith is to be measured by an objective, rather than subjective, standard. *Herring*, 129 S. Ct. at 701, 703; see *id.* at 710 n.7 (Ginsburg, J., dissenting) (noting that "[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police"). Thus, in *Leon*, the Court held that the exclusionary rule does not apply where officers acted in "objectively reasonable reliance" on a defective warrant. See 468 U.S. at 922.

Even assuming, however, that the relevant inquiry for purposes of the "flagrant disregard" doctrine is whether the officer acted with objective, rather than subjective, bad faith, it is clear that the necessary showing has been made here. The district court found that the supervising officer acted according to his belief that "the express limitations of the search warrant[s] were meaningless[] and certainly not restrictions that would limit his conduct in any way." App., *infra*, 90a; see *id.* at 53a-54a (same). Whatever the precise contours of those limitations, compare *id.* at 19a-27a (court of appeals holding that particular documents fell within the scope of the warrant), with *id.* at 41a-49a (district court holding to the contrary), it plainly would not have been objectively reasonable for the officer to conclude that the limitations were altogether "meaningless" (and therefore that "he

had limitless power to seize virtually anything from [petitioner's] home and business," *id.* at 54a). By any standard, therefore, the supervising officer in this case acted in bad faith—and the court of appeals should have taken that bad faith into account in determining whether blanket suppression was appropriate under the "flagrant disregard" doctrine.

b. The court of appeals compounded its error with regard to the relevance of intent by failing to engage in any inquiry concerning the overbreadth of the searches—*i.e.*, whether the executing officers seized a substantial volume of items not covered by the warrants—in determining the applicability of the "flagrant disregard" doctrine. Although the district court found that "the executing agents grossly exceeded the scope of the search warrants," App., *infra*, 55a, the court of appeals did not independently assess the actual overbreadth of the searches; instead, it merely stated, without elaboration, that its holding that the documents the government was planning to introduce at trial fell within the scope of the warrant "substantially undercut[] the [district court's] blanket suppression ruling." *Id.* at 29a. While the court of appeals proceeded to fault the district court for citing the government's subsequent return of large quantities of materials seized from petitioner's home, see *id.* at 30a n.20, the district court specifically listed numerous seized items that unquestionably were outside the scope of the warrant in support of its conclusion that the executing officers "grossly exceeded" the scope of the warrants. See *id.* at 54a n.15, 55a. The district court relied on the government's "large-scale" return of those and other items—which occurred in response to a complaint by petitioner's counsel that the executing officers had seized items outside the warrants'

scope—merely to "further bear[] out" its conclusion. *Id.* at 55a n.16.

Because the court of appeals ultimately did not disturb the district court's finding that the executing officers seized a substantial volume of items not covered by the warrants, it is unclear what, if any, "extraordinary circumstances" would justify blanket suppression under the court of appeals' view of the "flagrant disregard" doctrine. See App., *infra*, 28a. The Fourth Circuit's crabbed interpretation of that doctrine is erroneous and warrants this Court's review.

C. The Question Presented Is An Important One That Merits The Court's Review In This Case

1. The question presented in this case—*i.e.*, whether blanket suppression is appropriate where officers believed that limitations in a search warrant were meaningless and seized a substantial volume of items not covered by the warrant—is a recurring one of great importance in the administration of the exclusionary rule. Since then-Judge Kennedy wrote the Ninth Circuit's path-marking opinion in *Rettig* more than 30 years ago, there have been innumerable cases in the lower federal and state courts concerning the validity and application of the "flagrant disregard" doctrine. See pp. 8-14, *supra*; 2 Wayne R. LaFave, *Search and Seizure* § 4.10, at 769-771 nn.189-190 (4th ed. 2004) (citing additional cases). Apart from its passing reference to the "flagrant disregard" doctrine in *Waller*, however, this Court has never directly addressed any question concerning that important aspect of the exclusionary rule. The question presented here, moreover, is of comparable importance to, if not greater importance than, the questions presented in this Court's two most recent decisions involving the application of the exclusionary rule in the context of Fourth

Amendment violations. See *Herring*, 129 S. Ct. at 698 (whether evidence found pursuant to a search incident to arrest should be suppressed because the arrest was due to a negligent error); *Hudson* v. *Michigan*, 547 U.S. 586, 588 (2006) (whether evidence found pursuant to warranted search should be suppressed because knock-and-announce rule was violated).

The question presented in this case is of ever more pressing importance in light of the current proliferation of prosecutions for "white-collar" offenses, in which the government typically relies on documentary, rather than physical, evidence. A search warrant in a white-collar case—like the warrants at issue here—will typically authorize officers to seize only those documents that specifically relate to the offense as to which there is probable cause. See App., *infra*, 44a-45a. As this Court has long recognized, however, "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). That is because, "[i]n searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Ibid.* Application of the "flagrant disregard" doctrine is particularly vital in the context of such searches, in order to deter officers from pursuing a seize-first, ask-questions-later strategy that transforms the execution of the warrant into "a fishing expedition for the discovery of incriminating evidence." *Foster*, 100 F.3d at 847 (internal quotation marks omitted).

2. This case constitutes an ideal vehicle for the Court to clarify the standards for invocation of the "fla-

grant disregard" doctrine, in light of the district court's findings that the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and that the executing officers seized a substantial volume of items not covered by the warrants. The only potential drawback is that the case arises in an interlocutory posture. In this instance, however, the Court should attach little weight to that fact in determining whether to grant review. As a preliminary matter, it was the *government* that initiated interlocutory review of the suppression order in this case, by pursuing an interlocutory appeal under 18 U.S.C. 3731. It would be inequitable if the government, having itself initiated interlocutory review in the court of appeals, now sought to invoke the posture of this case as a basis for insulating the court of appeals' decision from further review.

More generally, there is good reason to grant review at this stage. As the Court has recognized in a variety of contexts, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007) (citing cases). This case presents a clean legal question on the applicability of the "flagrant disregard" doctrine, and further proceedings will not enhance the factual record pertinent to that question. The question presented, moreover, is an important one that merits the Court's review—and resolving that question in petitioner's favor will effectively bring proceedings in this case to an end, because, if the documents in dispute are excluded, the government will surely be unable to proceed with petitioner's

prosecution.[6] Further review is therefore warranted in this case and at this juncture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Petitioner's trial is currently scheduled to begin on September 29, 2009. If the petition for certiorari is granted, the trial would presumably be postponed pending the Court's disposition.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 07-4386

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

PRADEEP SRIVASTAVA, Defendant-Appellee.

Filed: March 19, 2008

Before: NIEMEYER and KING, Circuit Judges, and DAVID R. HANSEN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Vacated and remanded by published opinion. Judge KING wrote the opinion, in which Judge NIEMEYER and Senior Judge HANSEN joined.

KING, Circuit Judge.

The government seeks relief, by way of this interlocutory appeal, from the Memorandum Opinion and Order entered in the District of Maryland on August 4, 2006, suppressing evidence seized by federal officers from the residence and medical offices of Dr. Pradeep Srivastava pursuant to search warrants issued by a magistrate judge. *See United States v. Srivastava*, 444 F.

Supp. 2d 385 (D. Md. 2006) (the "Suppression Ruling"). The government also appeals from the court's order of March 6, 2007, declining to reconsider its Suppression Ruling. *See United States v. Srivastava*, 476 F. Supp. 2d 509 (D. Md. 2007). Put succinctly, the government contends that the evidence suppressed was constitutionally seized and within the scope of the search warrants, and that the court's blanket suppression of all seized evidence was erroneous. As explained below, we agree with the government that the Suppression Ruling was legally unsound, and thus vacate and remand.

I.

A.

In early 2003, a criminal investigation was initiated by the Department of Health and Human Services (the "HHS"), the Federal Bureau of Investigation (the "FBI"), and the government's Office of Personnel Management, into an alleged health care fraud scheme involving Srivastava, a licensed cardiologist practicing with two associates in Maryland. The federal authorities suspected that Srivastava and his associates were involved in the submission of false claims to various health care benefit programs, in violation of 18 U.S.C. § 1347.[1] As a

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[1] Section 1347 of Title 18 makes it an offense to

> knowingly and willfully execute[ ], or attempt[ ] to execute, a scheme or artifice—
>
> (1) to defraud any health care benefit program; *or*
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care

result, the authorities commenced an investigation into Srivastava's billing practices.

In March 2003, the fraud investigation had progressed to the stage where Jason Marrero, an HHS agent specializing in the investigation of health care fraud ("Agent Marrero"), applied to a magistrate judge in the District of Maryland for three search warrants. By Agent Marrero's submission to the judge, the government sought the seizure of the "fruits, evidence and instrumentalities of false claims submissions" from Srivastava's medical offices in Greenbelt and Oxon Hill (the "Greenbelt office" and the "Oxon Hill office," respectively), and from his residence in Potomac (the "Potomac residence"). J.A. 31.[2] The applications for the search warrants were supported by Agent Marrero's nineteen-page affidavit (the "Affidavit"), in which he specified, inter alia, that Srivastava and his medical practice group had defrauded health care benefit programs in various ways: billing for medical services not rendered; billing for duplicate medical services through different insurers; specifying inappropriate diagnosis codes for patient services on medical claims; improperly billing for incidental services; and altering medical records. The Affidavit also described specific instances of false billing for services not rendered, as well as for duplicate services, including dollar amounts paid for excess reimbursements.

Significantly, the Affidavit made factual assertions indicating that documents and records related to Srivastava's medical practice—constituting possible evi-

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benefits, items, or services.

18 U.S.C. § 1347 (emphasis added).

[2] Citations herein to "J.A. —" refer to the contents of the Joint Appendix filed by the parties in this appeal.

dence of health care fraud—would be found in the Potomac residence:

- A former employee of Srivastava, who was a confidential informant in the fraud investigation, confirmed that Srivastava "directed most of the billing to health care benefit programs," and that such programs "sent most payments and Explanation of Benefit letters to Srivastava's house," J.A. 42;

- Srivastava had the medical practice's "insurance billing done from [his] house," and the practice submitted such billing to insurers both "by mail and electronically by computer," *id.*; and

- Srivastava had "listed and currently lists [the Potomac] residence . . . as the billing address for claims submitted electronically to Medicare," *id.* at 46.

On the basis of these and other facts spelled out in the Affidavit, Agent Marrero asserted "that there is probable cause to believe that Srivastava's [Greenbelt and Oxon Hill] offices . . . and Srivastava's [Potomac] residence . . . contain fruits, evidence and instrumentalities of [health care fraud] and that the items [sought] are fruits, evidence and instrumentalities of the violation." *Id.* at 48.

On March 20, 2003, the magistrate judge issued three search warrants, each accompanied by an identical two-page "Attachment A," captioned "Items To Be Seized Pursuant To A Search Warrant." J.A. 49-51.[3] The warrants "commanded" the searching officers, inter alia, to search the Greenbelt office, the Oxon Hill office, and the

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[3] Only one of the three search warrants—for the Oxon Hill office—is contained in the Joint Appendix filed by the parties. It is undisputed, however, that the three warrants, except for describing the place to be searched, are materially identical.

Potomac residence on or before March 27, 2003, and, if the property listed in Attachment A "be found there to seize same." *Id.* at 49. Attachment A introduced the list of documents and records to be seized under each warrant as follows:

> The following records including, but not limited to, financial, business, patient, insurance and other records related to the business of Dr. Pradeep Srivastava [and his two associates], for the period January 1, 1998 to Present, which may constitute evidence of violations of Title 18, United States Code, Section 1347.

Id. at 50. Attachment A then specified in some detail ten categories of things that were to be seized, including personnel records; health care benefit program manuals and documentation; correspondence between medical office personnel and health care benefits program personnel; documents relating to investigations of the medical group's billing practices; records of complaints about patient treatment; records of certain specified patients; computer files or programs related to the other materials identified; plus calendars, appointment books, correspondence, passports, photographs, and other documents indicating Srivastava's whereabouts during the period under investigation. *Id.* at 50-51. Importantly, category 2 of Attachment A commanded the seizure of "[f]inancial records, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other records reflecting income and expenditures of the business." *Id.* at 50.[4]

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[4] The other nine categories of documents and records commanded to be seized were, as described in Attachment A of the search war-

rants, the following:

1. Personnel records for all current and former employees, including but not limited to lists of employee names, employee resumes, employee time sheets, job applications, job training records, profession[al] certifications, and payroll records.

* * *

3. Health care benefit program training manuals, regulations, bulletins, reports, notices, pamphlets, and correspondence concerning proper billing and documentation procedures, and any documentation regarding instructions for billing health care benefit programs.

4. Correspondence, memoranda, and notes of conversations, including but not limited to those relating to communications between medical office personnel and personnel for health care benefit programs.

5. Any and all records indicating [Dr.] Pradeep Srivastava's [or his associates'] locations and activities during the period January 1, 1998 to the present, including but not limited to calend[a]rs, appointment books, correspondence, passports, visas, photographs and other documents.

6. Any documents []including but not limited to reports, correspondence, memorandums, work papers, interview notes and other notes relating to any internal or external investigation, audit, or other review of the billing/medical practice of Dr. Pradeep Srivastava, to include [his associates].

7. Records of complaints, including but not limited to complaints concerning the treatment provided by [Dr.] Pradeep Srivastava [or his associates].

8. All information and/or data, pertaining to records described in this Attachment above, stored in the form of magnetic or electrical coding on computer media or on media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to floppy diskettes, fixed hard disks, video cassettes, and any other media which is capable of storing magnetic coding.

9. Computer codes and programs, computer software, instructional manuals, operating instructions and sources of information, to

B.

On March 21, 2003, HHS and FBI agents simultaneously executed the search warrants at the three specified locations. Prior to the searches being conducted, Agent Marrero briefed the executing officers on what was to be done, summarizing for them the contents of the warrants and the Affidavit. Two of the searches—those conducted at the Greenbelt office and the Potomac residence—yielded the seizure of documents and records that are specifically implicated in this appeal.[5]

From the Potomac residence, the officers seized, inter alia, copies of the tax returns of Dr. Srivastava and his wife; stock brokerage account records; information about the construction of a second home; bank records relating to several family financial transactions; travel information; Srivastava's wallet; unopened mail; credit cards; Indian currency; a pharmacy card; and checks from various banks. From the Greenbelt office, the agents seized, inter alia, copies of bank remittance records relating to the State Bank of India (collectively,

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the extent that they are necessary to extract and copy any of the information set forth in paragraphs 1 through 8 above.

10. All patient records and documentation relating to the Medicare beneficiaries and private health care insurance subscribers listed below. This includes complete medical files, patient appointment books, patient billing records, office sign-in sheets, explanation of benefits (EOBs), and telephone messages in any form. [Several pages of Medicare beneficiaries and insurance subscribers were thereafter identified.]

J.A. 50-51.

[5] Although a substantial group of documents and records were also seized in the third search (of the Oxon Hill office), and are also encompassed in the Suppression Ruling, the government does not presently propose to utilize them at trial.

the "Bank of India Transfers"). The Bank of India Transfers reflected, inter alia, that Srivastava had, over a period of several months in 1999 and 2000, transferred more than $4 million to the State Bank of India.

In April 2003, after the searches had been completed, the government returned to Srivastava approximately 80% of the documents and records seized from the Potomac residence.[6] During the same time frame, Agent Marrero provided the United States Attorney with a copy of the Bank of India Transfers, which were also provided to the Internal Revenue Service (the "IRS"). IRS agents thereafter concluded that the Bank of India Transfers indicated a likely failure to disclose a foreign financial account.[7] After obtaining other information relating to the Transfers—for example, that Srivastava had not acknowledged any foreign bank accounts on his 1999, 2000, and 2001 personal income tax returns—the IRS initiated an investigation of Srivastava for possible

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[6] The return to Srivastava in April 2003 of approximately 80% of the things seized from the Potomac residence resulted from an agreement between the parties. In returning those records, the government did not concede that they had been improperly seized. By their agreement in this regard, the lawyers apparently obviated the need for preindictment proceedings under Rule 41(g) of the Federal Rules of Criminal Procedure. *See infra* note 20. As a result, the suppression issues were not litigated until early 2006.

[7] As mandated by Treasury Department regulations, a report must be filed with the IRS by any person in and doing business in the United States, who possesses an interest in or authority over a foreign financial account exceeding $10,000 during a calendar year. *See* 31 C.F.R. §§ 103.24, 103.27(c); *see also* 31 U.S.C. § 5315(c) (authorizing Secretary of Treasury to prescribe reporting requirements); *id.* § 5322 (providing criminal penalties for willful violations of Treasury Department regulations, such as those mandating foreign financial account reports).

reporting violations. This investigation ultimately led to his indictment for tax fraud.

C.

On October 12, 2005, Srivastava was indicted by a grand jury in the District of Maryland on two counts of tax evasion, in violation of 26 U.S.C. § 7201, plus one count of making false statements on a tax return, in violation of 26 U.S.C. § 7206(1).[8] According to the indictment, Srivastava had concealed more than $40 million in capital gains on investments in technology stocks and stock options, and underpaid his income taxes for tax years 1998 and 1999 by more than $16 million. The indictment alleges, inter alia, that:

- Srivastava invested a substantial portion of income from his medical practice in stocks and stock options, but failed to provide important information relating to his stock and stock options trading to the accountant who prepared his tax returns;

- As a consequence of those omissions, the accountant prepared, and Srivastava filed, tax returns that resulted in an underpayment of taxes in 1998 by approximately $165,000, and in 1999 by more than $16 million;

- In 2000, Srivastava's portfolio substantially declined in value, and he failed to disclose short-term capital losses of approximately $10.8 million. Although nondisclosure of these losses did not affect his taxes due and owing for 2000, it served to conceal his unreported short-term capital gains for 1998 and 1999.

In January 2006, following his indictment, Srivastava filed a suppression motion challenging the constitutional-

[8] The indictment is found at J.A. 7-26.

ity of the seizures that had been made nearly three years earlier, pursuant to the search warrants. In that motion, Srivastava contended, inter alia, that documents and records seized in the searches were of a personal nature and not subject to seizure, and that the seized documents and records exceeded the scope of the warrants.[9] Responding to the suppression motion, the government advised the court that it possessed approximately twenty-five documents and records—all seized from the Potomac residence—that it intended to use as trial evidence (collectively, the "Potomac Documents"). Several of the Potomac Documents had been seized from Srivastava's bedroom in the Potomac residence, including:

- An IRS Form 1099 for tax year 1999 found in an envelope marked as "1999 Final";[10]

- Several documents from an envelope dated October 15, 1996, including multiple IRS Forms 1099 for tax year 1998, a handwritten document describing "Bank In-

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[9] In his effort to suppress the evidence seized under the warrants, Srivastava also sought an evidentiary hearing in the district court, pursuant to *Franks v. Delaware*, maintaining that the Affidavit had affirmatively omitted material information. *See* 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."). At a March 27, 2006 hearing conducted on the suppression motion, the district court denied Srivastava's request for a *Franks* hearing, after determining that the magistrate judge had not been misled by the Affidavit.

[10] An IRS Form 1099 is used to report various types of income—other than wages, salaries, and tips—to the IRS. Such income includes, inter alia, dividends and distributions, interest, government payments, payments to independent contractors, and miscellaneous income.

terest Payment," and a statement and fax relating to accounts with "Mesirow Financial Inc./Bentley-Lawrence Securities";[11] and

- Several documents from a folder labeled "1996 Tax Info.," including IRS Forms 1099 for tax years 1997 and 1999, spreadsheets for accounts variously labeled "Options Transactions" and "Stock Transactions," a "Schedule of Realized Gains and Losses" dated October 14, 1999, and a 1999 "Tax Reporting Statement."[12]

Several other Potomac Documents that the prosecution seeks to utilize at trial were found in a shoe box marked "Tax Return Info 2000," seized from an office on the first floor of the Potomac residence. The documents from the shoe box included:

- A fax (dated October 8, 2001) from Srivastava's accountant requesting items needed to complete Srivastava's 2000 tax return;

- A spreadsheet labeled "Accounts of Dr. Pradeep Srivastava/Stock Transactions—8/25/99 to 12/31/99 By Bentley Lawrence Account"; and

- A handwritten document with information about various bank accounts and transactions.

In opposing the suppression motion, the government alternatively advised that, if the court suppressed the

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[11] Although several Potomac Documents discovered in the Potomac residence were found in folders dated 1996, the Documents seized sufficiently related to the pertinent time frame.

[12] Intermingled with the financial records discovered in one of the folders located in the bedroom of the Potomac residence were other records of Srivastava's medical practice, including a client master list, employee time sheets, and a memorandum relating to employee leave and vacation time. The government does not propose to offer those items into evidence.

Potomac Documents, it intended to utilize at trial the Bank of India Transfers seized from the Greenbelt office, "to explain the independent source for [the IRS case agent's] investigation and the inevitable discovery of the brokerage, bank and other evidence supporting the tax charges." J.A. 110. The Bank of India Transfers included the following:

- A letter from Srivastava, dated December 16, 1999, printed on the medical practice letterhead of "Pradeep Srivastava, M.D., F.A.C.C." and an associate, and faxed by the Greenbelt office manager to the State Bank of India in New York, directing a wire transfer of the sum of $150,000 for deposit in Srivastava's account with the State Bank of India in New Delhi;

- A fax cover and confirmation sheet dated December 16, 1999, also on the medical practice letterhead; and

- Remittance confirmations of various dates from the State Bank of India regarding the $150,000 deposit and seven other deposits totalling more than $4 million.

On June 9, 2006, the court conducted an evidentiary hearing on Srivastava's contentions regarding the scope of the search warrants and the constitutionality of their execution. At the hearing, the court heard testimony from Agent Marrero and an IRS agent, as well as argument concerning whether the seized documents and records were within the scope of the warrants. Srivastava contended, inter alia, that although such documents and records may have financial significance, they did not relate to his medical practice, were not evidence of health care fraud, and thus were not within the ambit of the warrants. The government maintained to the contrary, arguing that the seized documents and records plainly fell within the scope of the warrants and that the suppression motion should be denied.

D.

On August 4, 2006, the district court issued its Suppression Ruling, ordering the suppression of the Potomac Documents, the Bank of India Transfers, and all other evidence seized in the three searches. In so ruling, the court first determined that "in order to fall within the scope of the warrant, a financial record not only had to have some relationship to Dr. Srivastava's business, but it also was subject to the requirement that it may constitute evidence that health care fraud had been committed." *United States v. Srivastava*, 444 F. Supp. 2d 385, 393 (D. Md. 2006). Next, the court analyzed whether, in view of the foregoing, the seizures of the Potomac Documents and the Bank of India Transfers were within the scope of the search warrants issued for the Potomac residence and the Greenbelt office, respectively. The court then concluded that the Potomac Documents had been improperly seized, because they "neither tended to show violations of the health care fraud statute, nor related to the business of Dr. Srivastava." *Id.* at 395. Turning to the Bank of India Transfers seized from the Greenbelt office, the court determined that, although they "arguably may have related to the business of Dr. Srivastava," nothing on their face "connotes or suggests evidence of health care fraud." *Id.* The Affidavit, the court emphasized, failed to discuss the handling of any financial proceeds of a fraud scheme, which, it observed, is a federal crime (i.e., money laundering) distinct from the federal offense of health care fraud. *Id.* at 396. The court thus concluded that, as with its suppression of the Potomac Documents, suppression of the Bank of India Transfers was constitutionally required.

Finally, the court considered the question of whether a blanket suppression of all of the seized evidence was warranted, concluding that

> [e]ven if . . . some of the documents at issue here were within the scope of the warrant, these documents would be excluded as well because the conduct of the agents who executed this warrant was so inappropriate as to warrant the exclusion of *all* evidence seized on March 21, 2003.

Srivastava, 444 F. Supp. 2d at 396-97. The court premised its blanket suppression ruling on two primary bases: first, its conclusion that execution of the warrants contravened the Fourth Amendment, specifically with respect to the quantity and character of the documents and records seized (including those voluntarily returned to Srivastava by the government); and, second, the testimony of Agent Marrero at the June 9, 2006 hearing, indicating (in the court's words) that he "did not consider himself to be limited to seizing business items only, or records that tended to show evidence of violations of the health care fraud statute." *Id.* at 397.[13] The court thus suppressed all of the documents and records seized in the three searches. In so ruling, the court reasoned that such a blanket suppression was warranted because of

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[13] In the Suppression Ruling, the court observed that Agent Marrero had

> provided astonishing testimony in which he indicated that he inserted [the substantive introductory language] merely as a "go by," and that he did not consider it to limit his actions in any way. When asked if it was true that he "didn't give much thought to what this meant" and whether he "just thought it was some boilerplate that ought to be" in the warrant, [Agent] Marrero agreed "for the most part," stating only that he "knew it was used before so it was appropriate language."

Srivastava, 444 F. Supp. 2d at 397.

Marrero's flagrantly excessive view of the scope of the warrants, and because such a view was not justified by either practical considerations or good-faith mistake. *See id.* at 400.[14] The Suppression Ruling thus barred the government from utilizing at trial (1) the Potomac Documents, (2) the Bank of India Transfers, and (3) all other documents and records seized under the warrants.

The government thereafter sought reconsideration of the Suppression Ruling, which the district court denied on March 12, 2007. *See United States v. Srivastava*, 476 F. Supp. 2d 509 (D. Md. 2007). In denying reconsideration, the court reiterated the Suppression Ruling's interpretation of the scope of the warrants, its bases for suppressing the Potomac Documents and the Bank of India Transfers, and the reasons for its blanket suppression of all the seized evidence. *See id.* at 512-14.

The government disagrees with the Suppression Ruling and the denial of its motion to reconsider, maintaining that those decisions were erroneous and undermine its effort to prosecute the tax fraud indictment pending against Srivastava. As a result, the government pursues this interlocutory appeal, and Srivastava's trial has been held in abeyance pending the appeal's resolution. We possess jurisdiction pursuant to the provisions of 18 U.S.C. § 3731.[15]

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[14] The Suppression Ruling also concluded that the documents and records that the government proposed to utilize at trial were not otherwise admissible under either the inevitable discovery or independent source exceptions to a Fourth Amendment violation. *See Srivastava*, 444 F. Supp. 2d at 401-12.

[15] In accordance with the jurisdictional predicate of 18 U.S.C. § 3731, the United States Attorney has certified that this interlocutory appeal "is not taken for purposes of delay" and that the evidence excluded by the Suppression Ruling "is a substantial proof of a fact material in the proceeding." J.A. 725.

II.

A.

Legal determinations made by a district court with respect to a suppression issue, including interpretations of the scope of a search warrant, are reviewed de novo on appeal. *See United States v. Hurwitz*, 459 F.3d 463, 470 (4th Cir. 2006); *United States v. Hurd*, 499 F.3d 963, 965 (9th Cir. 2007) ("Whether a search is within the scope of a warrant is a question of law subject to de novo review."). In conducting such a de novo review, we are obliged to assess the contents of a search warrant and its supporting affidavits "in a commonsense and realistic fashion," eschewing "[t]echnical requirements of elaborate specificity." *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *see also United States v. Angelos*, 433 F.3d 738, 745 (10th Cir. 2006); *United States v. Gorman*, 104 F.3d 272, 275 (9th Cir. 1996).

We review for abuse of discretion a district court's blanket suppression of seized evidence. *See United States v. Borromeo*, 954 F.2d 245, 246 (4th Cir. 1992). We recognize that a district court necessarily abuses its discretion when it makes an error of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *United States v. Ebersole*, 411 F.3d 517, 526 (4th Cir. 2005) ("By definition, a court abuses its discretion when it makes an error of law." (internal quotation marks omitted)). In analyzing the constitutionality of a search warrant's execution, we must conduct an "objective assessment of the [executing] officer's actions in light of the facts and circumstances confronting him at the time," rather than make a subjective evaluation of "the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985).

B.

This appeal obligates us to assess, in a pretrial context, the Suppression Ruling made by the district court in connection with the tax fraud prosecution pending against Srivastava. The appeal implicates questions related to the *warranted* searches of Srivastava's Potomac residence and Greenbelt office. Such questions arise under the Fourth Amendment, which protects individuals against unreasonable searches and seizures conducted by the authorities, specifying its guarantee in the following terms:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The review of Fourth Amendment search and seizure issues in our Court is not an uncommon occurrence. In most of these instances, however, the issues arise from circumstances where the authorities have conducted *warrantless* searches and seizures of private property. As such, we are regularly called upon to assess an array of constitutional issues that arise from *warrantless* searches and seizures, in a wide range of circumstances. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (explaining "plain view" warrantless seizures); *Chimel v. California*, 395 U.S. 752 (1969) (authorizing warrantless searches incident to arrest); *Terry v. Ohio*, 392 U.S. 1 (1968) (approving warrantless searches and

seizures incident to "stop and frisk" situations); *Warden v. Hayden*, 387 U.S. 294 (1967) (explaining "hot pursuit" principle of warrantless searches and seizures).

Our Court—as well as the Supreme Court and other judicial bodies—has consistently encouraged the authorities to act prudently in the Fourth Amendment context, and, when the circumstances permit, to seek and secure the authorization of a judicial officer—in the form of a warrant—before conducting a search or seizure. *See Ventresca*, 380 U.S. at 106 (in explaining judiciary's strong preference for warranted searches and seizures, observing that, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *see also United States v. Servance*, 394 F.3d 222, 229 (4th Cir. 2005) ("[L]aw enforcement officers are encouraged to act pursuant to judicial sanction, and searches and seizures carried out pursuant to duly issued search warrants 'carry a presumption of legality.'" (quoting *Anglin v. Dir., Patuxent Inst.*, 439 F.2d 1342, 1346 (4th Cir. 1971))). In this case, the government contends that its agents acted both prudently and reasonably. The officers first prepared an extensive and detailed Affidavit demonstrating probable cause for the searches and seizures they sought to carry out and then sought and secured the magistrate judge's authorization for the seizures.

By its Suppression Ruling, the district court determined that the search warrants authorized the seizure of only those "documents that related to Dr. Srivastava's business *and* that may show in some way that health care fraud had been committed." *United States v. Srivastava*, 444 F. Supp. 2d 385, 392 (D. Md. 2006). This conclusion provides the foundation for the issues presented in this appeal. First, the government asserts that the court erred in concluding that the Potomac Docu-

ments were not related to Srivastava's medical practice, were not likely to constitute evidence of health care fraud, and thus were not within the scope of the warrants. Second, the government maintains that the court erred in concluding that the Bank of India Transfers, although "legitimately appear[ing] to be records of the business," were not evidence of health care fraud, and thus also not within the ambit of the warrants. *Id.* at 396. Finally, the government maintains that, in these circumstances, the warrants were properly executed and the blanket suppression ruling is legally defective.

III.

In disposing of this appeal, we first assess whether the scope of the search warrants includes the two groups of documents that the government intends to use at trial: (1) the Potomac Documents and (2) the Bank of India Transfers. We then analyze whether the court's blanket suppression of all the seized evidence was legally justified.

A.

We begin our analysis with the government's contention that the district court misconstrued the scope of the search warrant for the Potomac residence. In this regard, the court determined that the Affidavit demonstrated probable cause that documents and records relating to Srivastava's medical practice, and that may constitute evidence of health care fraud, would be found in the residence. *See United States v. Srivastava*, 444 F. Supp. 2d 385, 392-93 (D. Md. 2006). Nevertheless, the court concluded that the warrant did not authorize the seizure of the Potomac Documents found there, because they were neither business-related nor evidence of health care fraud. *Id.* at 395-96.

1.

As the Suppression Ruling recognized, the Affidavit made compelling assertions that documents and records relating to Srivastava's medical practice—and that may constitute evidence of health care fraud—would be found in the Potomac residence. Indeed, Srivastava conducted a substantial part of his medical practice from the Potomac residence: claims for medical services were submitted to health care benefit programs from the residence; the residence was used as the billing address for the medical practice; and the practice received payments from such programs, both electronically and by mail, at the residence. In these circumstances, the magistrate judge was unquestionably justified in issuing the search warrant for the Potomac residence, commanding the officers to seize a broad range of things, "*including, but not limited to,* financial, business, patient, insurance and other records related to the business of Dr. Pradeep Srivastava . . . which may constitute evidence of [health care fraud]." J.A. 50 (emphasis added). The Affidavit established that documents and records sought from the residence—specifically (as identified in category 2 of Attachment A) Srivastava's "*[f]inancial records*, including but not limited to *accounting records*, *tax records*, accounts receivable logs and ledgers, *banking records*, and other records reflecting income and expenditures of the business"—related to his medical practice and constituted evidence of health care fraud. *Id.* (emphasis added). Finally, the categories of items designated for seizure extended to (as identified in Category 5) Srivastava's "calend[a]rs, appointment books, correspondence, passports, visas, photographs and other documents." *Id.* at 51.

2.

We turn next to the issue of whether the Potomac Documents were within the scope of the search warrant for the Potomac residence. As the Supreme Court has mandated, and our sister courts of appeals have recognized, a search warrant is not to be assessed in a hypertechnical manner. *See United States v. Ventresca*, 380 U.S. 102, 108 (1965) (explaining that "[t]echnical requirements of elaborate specificity once exacted under common law pleadings" are not applicable in Fourth Amendment context); *see also United States v. Angelos*, 433 F.3d 738, 745 (10th Cir. 2006) ("We review de novo the scope of the search warrant at issue, employing a standard of practical accuracy rather than technical precision." (internal quotation marks omitted)); *United States v. Gorman*, 104 F.3d 272, 275 (9th Cir. 1996) ("[T]here is no room in the midst of a criminal investigation for hypertechnical reading or interpretation of a search warrant." (internal quotation marks omitted)). Instead, as the Supreme Court explained in *Ventresca*, we must simply assess such issues "in a commonsense and realistic fashion." 380 U.S. at 108; *see also Gorman*, 104 F.3d at 275 ("Plain reading and common sense are the landmarks for the execution and interpretation of the language of a search warrant." (internal quotation marks omitted)).[16]

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[16] Although our Court has, on many occasions, applied *Ventresca*'s "commonsense and realistic fashion" principle in analyzing the sufficiency of supporting affidavits, we do not appear to have specifically utilized this principle in assessing the scope of a search warrant. On this point, however, we readily agree with the Ninth and Tenth Circuits, *see Gorman*, 104 F.3d at 275; *Angelos*, 433 F.3d at 745, and apply the *Ventresca* principle to our assessment of the seizures being challenged, eschewing a hypertechnical approach to these issues.

As the district court concluded in its Suppression Ruling, "in order to fall within the scope of the warrant, [the Potomac Documents] not only had to have some relationship to Dr. Srivastava's business," but were also "subject to the requirement that [they] may constitute evidence that health care fraud had been committed." *See Srivastava*, 444 F. Supp. 2d at 393. Accordingly, we analyze whether the Potomac Documents were related to Dr. Srivastava's medical practice and whether they may constitute evidence of health care fraud, beginning with their relationship to his business.

a.

Although Srivastava argues on appeal that the search warrant for the Potomac residence limited the authorized seizures to those documents and records that are "related to the business" (i.e., the medical practice), this contention does not undermine the constitutionality of the seizure of the Potomac Documents. Of note, Srivastava's medical practice operated as a "Subchapter S" corporation, under which his portion of the practice's income was passed through and taxed directly to him as an individual.[17] In such circumstances, it is difficult to realistically define a bright line between "personal financial records" and "business records," as Srivastava implores us to do. Rather, it is consistent with both common sense and realism to deem the financial records relating to the medical practice as being nearly synonymous with the financial records of Srivastava individually. By way of example, with respect to the Potomac Documents seized from Srivastava's bedroom:

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[17] A corporation that elects to be taxed under Subchapter S, *see* 26 U.S.C. §§ 1361-63, pays no federal income tax, but passes all its income and losses through to its shareholders. Those shareholders then report the income or losses on their individual tax returns.

• The IRS Form 1099 for tax year 1999 found in an envelope marked "1099 Final" constituted a financial record, as specified in category 2 of Attachment A. Under law, an IRS Form 1099 reflects income paid to a taxpayer. In this instance, the Form reflected certain interest income paid to Srivastava in 1999, which also, in these circumstances, reasonably related to his business of practicing medicine; and

• Additional IRS Forms 1099 for tax year 1998 (found in the envelope dated October 15, 1996) and for tax years 1997 and 1999 (from the folder marked "1996 Tax Info.") likewise constituted financial records related to Srivastava and his medical practice, specified for seizure under Attachment A.

Assessed in a de novo context, the balance of the Potomac Documents also were within the ambit of the financial records specified for seizure in category 2 of Attachment A. More specifically, those records—reflecting stock and option transactions and banking activities—related to the receipt of Srivastava's income and, thus, also reasonably related to his medical practice. Accordingly, we cannot agree with the district court that such documents were outside the scope of the warrant for being non-business related.

b.

We next consider the Suppression Ruling's conclusion that the Potomac Documents were not within the scope of the search warrant for the Potomac residence because they failed to satisfy the magistrate judge's requirement that things could only be seized if they "may constitute evidence that health care fraud had been committed." *Srivastava*, 444 F. Supp. 2d at 393. In this regard, we emphasize that the warrant's mandate was only that seized items "relate[ ] to the business" of Dr.

Srivastava and "*may* constitute evidence of [health care fraud]." J.A. 50 (emphasis added). Thus, we must conduct our de novo assessment with this mandate in mind. Pursuant to the warrant, documents or records to be seized were not required, on their face, to necessarily constitute evidence of health care fraud—rather, they only potentially had to be evidence of such fraud. And, in the context of a fraud investigation, the relevant evidence will in many instances be fragmentary, discovered in bits and pieces, and thus difficult to either identify or secure. Standing alone, a particular document may appear innocuous or entirely innocent, and yet be an important piece of the jigsaw puzzle that investigators must assemble. The complexity of a fraud scheme, however, should not be permitted to confer some advantage on the suspected wrongdoer. *See Andresen v. Maryland*, 427 U.S. 463, 481 n.10 (1976) ("The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.").

Here, the Affidavit demonstrated probable cause that Srivastava's medical practice had submitted fraudulent claims to health care benefit programs from the Potomac residence, suggesting that the executing officers were likely to encounter a "paper puzzle" in carrying out the command of the warrant. For example, a piece of the fraud puzzle in this case included Srivastava's financial records, such as IRS Forms 1099 reflecting his income. *Cf. United States v. Norton*, 867 F.2d 1354, 1360 (11th Cir. 1989) (recognizing that financial records were pieces of "paper puzzle" verifying fraudulent kickback scheme). Indeed, a time-honored concept in white-collar and fraud investigations is simply to "follow the money." *See, e.g.*, David M. Nissman, *Follow the Money: A Guide to Fi-*

nancial and Money Laundering Investigations (2005). That principle is particularly applicable here, and it is deserving of emphasis. The possession or transfer of "large sums of money, and the manner in which those funds were acquired [are] highly relevant to proof of [a] scheme to defraud." *United States v. Shamy*, 656 F.2d 951, 958 (4th Cir. 1981).[18]

Having made a de novo assessment of the scope of the warrant for the Potomac residence—and having done so in a non-hypertechnical, common-sense, and realistic manner—we are satisfied that the Potomac Documents were within the scope of its specifications. The Affidavit spelled out a complex fraud scheme, and the warrant specified that things related to Srivastava's medical practice, and that may constitute evidence of health care fraud, would be discovered in the residence. In these circumstances, we are simply unable to rule that the Potomac Documents could not constitute evidence of health care fraud. As a result, the seizure of the Potomac Documents was consistent with the scope of the warrant and the mandate of the Fourth Amendment.

B.

Turning to the government's contention that the Bank of India Transfers were within the scope of the search warrant issued for the Greenbelt office, we conclude that they were also erroneously suppressed by the district court. In this regard, the Suppression Ruling recognized that the Bank of India Transfers "legiti-

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[18] The reasoning underlying this point—that evidence of the possession and transfer of large sums of money can, in the proper context, be a strong indicia of fraud—is further emphasized by our analysis of the district court's erroneous suppression of the Bank of India Transfers. *See infra* Part III.B.

mately appeared to be records of the business." *Srivastava*, 444 F. Supp. 2d at 396. Nevertheless, the court concluded that the warrant for the Greenbelt office did not authorize the seizure of the Transfers because they did not constitute evidence of health care fraud. In so ruling, the court determined that the Affidavit failed to show probable cause for seizure of the Transfers as financial proceeds evidence, emphasizing that there had been no discussion in the Affidavit of "what Dr. Srivastava may have done with the monies he received as payment for his procedures," or "how [he] handled his banking." *Id.* Furthermore, the court observed that concerns for the proceeds of Dr. Srivastava's alleged crimes would involve money laundering activities, which are "distinct from health care fraud." *Id.*

To the contrary, in following the money, the financial records of a suspect may well be highly probative of violations of a federal fraud statute. *See Shamy*, 656 F.2d at 958 (concluding that, in mail fraud investigation—in the words of Judge Haynsworth—"large sums of money, and the manner in which those funds were acquired were highly relevant to proof of the scheme to defraud"). Indeed, the health care fraud statute provides that it may be violated by a person who "obtain[s] . . . *money* or property" by means of false or fraudulent pretenses. 18 U.S.C. § 1347 (emphasis added). In the context of a fraud investigation, the financial and accounting records of the suspects—and, as here, records reflecting the overseas transfer of large sums of money by a prime suspect—are potentially compelling evidence that the scheme has been conducted and carried out, and that, in the terms of § 1347, "money or property" has been ob-

tained as the result of false or fraudulent billing practices.[19]

Consequently, and consistent with our conclusion that the Potomac Documents were subject to seizure under the search warrant for the Potomac residence, the Bank of India Transfers were sufficiently designated for seizure by the warrant for the Greenbelt office. As recognized by the district court, the Transfers "legitimately appeared to be records of the business." *Srivastava*, 444 F. Supp. 2d at 396. Furthermore, the possession and transfer of large sums of money—more than $4 million transferred overseas by Srivastava to a bank in India—could readily be deemed evidence of the fraud scheme described in the Affidavit. Simply put, the possession and transfer to another country of such large sums was, even when viewed favorably to Srivastava, very suspicious. And, from the standpoint of the executing officers, it was compelling evidence of a potential health care fraud offense (i.e., obtaining, by false and fraudulent pretenses, the money or property of a health care benefit program). As a result, we also reject the district court's restrictive interpretation of the scope of the warrant for the Greenbelt office, and conclude that the seizure of the Bank of India Transfers was consistent with the Fourth Amendment.

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[19] If a false or fraudulent billing scheme has been conducted in connection with a medical practice, multiple federal fraud statutes are potentially implicated. For example, federal fraud offenses that might be pursued on the basis of a factual scenario arising from a health care fraud scheme include, inter alia, mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), tax fraud (26 U.S.C. §§ 7201, 7206), and health care fraud (18 U.S.C. § 1347). Health care fraud is simply one species of such a scheme, which Congress saw fit to combat through its 1996 enactment of § 1347.

C.

Finally, having determined that the Potomac Documents and the Bank of India Transfers were within the ambit of the search warrants for the Potomac residence and the Greenbelt office, we assess the government's challenge to the blanket suppression of all the seized evidence. In that respect, the district court found that the warrants had been so flagrantly and unconstitutionally executed that a blanket suppression was justified. We have consistently recognized, however, that, "[a]s a general rule, if officers executing a search warrant exceed the scope of the warrant, only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible." *United States v. Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000); *see also United States v. Shilling*, 826 F.2d 1365, 1369 (4th Cir. 1987) (holding that "[t]he exclusionary rule does not compel suppression of evidence properly covered by a warrant merely because other material not covered by the warrant was taken during the same search"). We have also recognized that only extraordinary circumstances—such as when "the warrant application merely serves as a subterfuge masking the officers' lack of probable cause," or if "the officers flagrantly disregard[ ] the terms of the warrant" by "engag[ing] in a fishing expedition for the discovery of incriminating evidence"—will justify the suppression of lawfully seized evidence. *United States v. Uzenski*, 434 F.3d 690, 706 (4th Cir. 2006) (internal quotation marks omitted).

By its Suppression Ruling, the district court determined that a blanket suppression was justified because, inter alia, the executing officers had "approached the searches of Dr. Srivastava's home and offices in a way that flagrantly exceeded the specific limitations of the warrants, and . . . grossly exceeded the scope of the war-

rants in their execution." *Srivastava*, 444 F. Supp. 2d at 401. The court also concluded that a blanket suppression was warranted, "[e]ven if . . . some of the documents at issue . . . were within the scope of the warrant." *Id.* at 396. Notwithstanding the court's explanation, we are unable to identify any extraordinary circumstances that might support this ruling. And, in any event, our conclusions that the Potomac Documents and the Bank of India Transfers were constitutionally seized substantially undercuts the blanket suppression ruling. For example, the court's finding that Agent Marrero thought "he had limitless power to seize virtually anything from Dr. Srivastava's home and business" is derived from its understanding that Marrero "*intended* to seize personal financial records," *id.* at 397—an intention not inconsistent with our de novo determination on the scope of the warrants. *See supra* Part III.A-B.

Even assuming—as the district court found—that Agent Marrero believed that the terms of the search warrants were "meaningless," and did not limit his conduct in any way, such an assumption does not support the blanket suppression ruling. *Srivastava*, 444 F. Supp. 2d at 398-99. Simply put, a constitutional violation does not arise when the actions of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer. As a result, the subjective views of Agent Marrero were not relevant—the proper test is an objective one. *See Maryland v. Macon*, 472 U.S. 463, 470 (1985) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." (internal citations omitted)); *see also Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988) (recognizing that executing officer's actions must be as-

sessed for objective reasonableness "in light of the facts and circumstances confronting him, without regard to his own subjective intent or motivation"). Although we might sympathize with the court's view that Marrero's testimony was disconcerting, his personal opinions were an improper basis for the blanket suppression ruling.[20]

In these circumstances, the district court made errors of law in its blanket suppression of the seized evidence, necessarily abusing its discretion in that regard. *See Koon v. United States*, 518 U.S. 81 (1996); *United States v. Ebersole*, 411 F.3d 517, 526 (4th Cir. 2005) ("By definition, a court abuses its discretion when it makes an error of law." (internal quotation marks omitted)). As a result, the blanket suppression ruling also constituted reversible error.[21]

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[20] The Suppression Ruling also invoked the government's voluntary return of approximately 80% of the documents and records seized from the Potomac residence, *see supra* note 6, to support its finding that the officers had flagrantly disregarded the scope of the search warrants. *See Srivastava*, 444 F. Supp. 2d at 399 n.16. To the contrary, the voluntary return of property seized under a valid warrant does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional. Significantly, the return resulted from an agreement of the parties, apparently obviating the need for a court proceeding under Federal Rule of Criminal Procedure 41(g) (authorizing person aggrieved by unlawful seizure or "by the deprivation of property," to seek property's return). And, Rule 41(g) contemplates that returned property may be admissible in later proceedings, authorizing the court to "impose reasonable conditions to protect access to the property and its use in later proceedings."

[21] Because we are satisfied that the Potomac Documents and the Bank of India Transfers were within the scope of the search warrants, we need not address the government's final contention—that the evidence generated during the IRS investigation was derived from an independent source.

IV.

Pursuant to the foregoing, we vacate the Suppression Ruling and remand for such other and further proceedings as may be appropriate.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4386

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

PRADEEP SRIVASTAVA, Defendant-Appellee.

Filed: October 14, 2008

ORDER

The court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge NIEMEYER, Judge KING, and Judge HANSEN.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Criminal No. RWT 05-0482

UNITED STATES OF AMERICA, Plaintiff,

v.

PRADEEP SRIVASTAVA, Defendant.

Aug. 4, 2006

OPINION

TITUS, District Judge.

On March 20, 2003, Magistrate Judge William Connelly signed three search warrants that authorized the search of Defendant Pradeep Srivastava's home and two medical offices for "financial, business, patient and other records related to" his "business . . . which may constitute evidence of violations of Title 18 U.S.C. § 1347," a statute prohibiting health care fraud. Execution of these warrants resulted in the seizure of extensive financial papers, both business and personal, some of which were referred to the Internal Revenue Service ("IRS") for investigation. Upon further inquiry, the IRS concluded that Dr. Srivastava had failed to properly file his per-

sonal income tax returns for tax years 1998-2000. On October 12, 2005, a grand jury returned an indictment[1] charging Dr. Srivastava with income tax evasion and false statements on tax returns.[2]

On January 21, 2006, Dr. Srivastava filed a Motion for An Evidentiary Hearing Pursuant to *Franks v. Delaware* and to Suppress Evidence [Paper No. 13], alleging that the search warrant affidavit distorted and omitted material information, misleading Judge Connelly to authorize a warrant "under which sweeping and impermissible general searches of [his] home and offices were conducted." Dr. Srivastava requested that the Court conduct an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and suppress the evidence seized in the searches. For reasons stated on the record on March 27, 2006, this Court denied Defendant's request for a *Franks* hearing. The Court heard further argument and testimony on the remaining issues raised in Dr. Srivastava's Motion to Suppress on

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[1] Count I of the indictment alleges that Dr. Srivastava filed an individual income tax return for 1998 on which Schedule D, Capital Gains and Losses, claimed a short-term capital loss of approximately $(826,591) rather than actual short-term capital gains totaling approximately $779,397.00, and filed an income tax return misstating the amount of taxable income and tax due. Count II of the indictment alleges that Dr. Srivastava filed a tax return in 1999 on which Schedule D, Short Term Capital Gains and Losses, reflected a short-term capital loss of $(990,288.00) rather than the actual short-term capital gain of $41,408,740, and accordingly filed a false income tax return that year reflecting a much diminished taxable income and amount of tax due. Finally, Count III of the indictment alleges that Dr. Srivastava filed an individual income tax return for 2000 that omitted certain short-term capital losses.

[2] The government ultimately chose to proceed with civil enforcement regarding the health care fraud issues.

June 9, 2006. For the reasons stated below, Dr. Srivastava's Motion to Suppress will be granted.

BACKGROUND

Dr. Srivastava is a cardiologist residing in Potomac, Maryland. At all times relevant to this indictment, he conducted his medical practice through his professional corporation, Pradeep Srivastava, M.D., P.C., a Subchapter S Corporation. He filed Form 1040 U.S. Individual Income Tax Returns jointly with his wife and Form 1120-S U.S. Income Tax Returns for his subchapter S corporation for his medical practice.[3] Dr. Srivastava invested a significant amount of money in the stock market, specifically in stocks and stock options. During the rapidly rising market in technology stocks of the late 1990s, Dr. Srivastava traded in stocks and stock options at a high volume and apparently earned substantial capital gains, with smaller accompanying capital losses.

The investigation that ultimately led to criminal tax charges against Dr. Srivastava initially focused on allegations that he, through his medical practice, was engaged in health care fraud. Special agents from the Department of Health and Human Services, Office of Inspector General ("HHS-OIG"), the Federal Bureau of Investigation and the Office of Personnel Management, Office of Inspector General conducted the initial stages of the health care fraud investigation of Dr. Srivastava. On March 20, 2003, Special Agent ("SA") Jason Marrero of HHS-OIG submitted a single affidavit in support of applications for three search warrants to Judge Connelly. The affidavit in support of the warrants included

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[3] As required by law, Dr. Srivastava included income from his medical practice professional corporation on his joint individual tax returns.

allegations that Dr. Srivastava billed for services not rendered to patients, billed patients for duplicate services, listed inappropriate codes on patient claims, improperly billed patients for incidental services, and/or altered medical records.

Judge Connelly approved all three warrants, two of which applied to Dr. Srivastava's medical offices in Greenbelt and Oxon Hill, and the third of which authorized a search of Dr. Srivastava's residence in Potomac. Each warrant contained identical substantive language that authorized the seizure of ten categories of records, "including but not limited to, financial, business, patient, insurance and other records *related to the business* of Dr. Pradeep Srivastava, to include Drs. Balnath Bhandary and Felipe Robinson, for the period January 1, 1998 to Present, *which may constitute evidence of violations of Title 18, United States Code, Section 1347.*"[4] (emphasis added). In pertinent part, the warrants specifically authorized the seizure of:

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[4] Section 1347 provides that, "[w]hoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services,

shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both." 18 U.S.C. § 1347.

> 2. *Financial records*, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other *records reflecting income and expenditures of the business.*

(emphasis added). Agents simultaneously executed these warrants on March 21, 2003.

Agents executing these warrants seized large volumes of information from Dr. Srivastava's offices and his home.[5] Of particular relevance to this case and the instant motion, agents seized from Dr. Srivastava's office copies of facsimile transmission letters directing wire transfers to his bank accounts with the Bank of India. Agents also seized from Dr. Srivastava's residence a fac-

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[5] The government lists 25 financial records it plans to introduce into evidence at trial: (1) spreadsheet detailing options transactions on Bentley-Lawrence ("BL") account; (2) spreadsheet detailing stock transactions on BL account, labeled "corporate"; (3) spreadsheet detailing options transactions on Speer Leeds account; (4) spreadsheet detailing stock transactions; (5) schedule of realized gains and losses; (6) form 1099 activity detail for BL account; (7) form 1099 activity detail for BL account; (8) form 1099 activity detail for BL account; (9) fax from CPA requesting information to prepare tax return; (10) tax reporting statement to support capital gains; (11) form 1099 activity detail supporting capital gains; (12) handwritten bank interest and payments statement; (13) tax reporting statement to support capital gains; (14) form 1099 activity detail to support capital gains; (15) fax to CPA detailing BL accounts; (16) form 1099 activity detail supporting capital gains; (17) tax reporting statement to support capital gains; (18) form 1099 activity detail to support capital gains; (19) tax reporting statement to support capital gains; (20) fax from CPA requesting items to complete tax return; (21) handwritten list of dividends and interest from bank accounts; (22) tax reporting statement to support capital gains; (23) tax reporting statement to support capital gains; (24) spreadsheet for capital gains; (25) email from stock broker detailing stock activity. *See* Paper No. 14 at 24.

simile transmission from a brokerage firm that appeared to list stock transactions for 1998, as well as spreadsheets from his financial records that showed capital gains of close to $40 million for tax year 1999.

After the searches were completed, SA Marrero forwarded to the United States Attorney's Office a copy of the Bank of India faxes found at Dr. Srivastava's Greenbelt location. The U.S. Attorney's office subsequently related this information to Supervisory Special Agent ("SSA") Brad Whites of the Wheaton, Maryland office of the IRS. On April 23, 2003, SSA Whites met with IRS Special Agent ("SA") Meredith Louden, and suggested to her that these faxes, which showed monies going to India, suggested a possible "FBAR" violation.[6] Acting upon this information, SA Louden contacted SA Marrero, who apprised her of the agents' discovery of the papers showing substantial wire transfers to India,[7] and

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[6] "FBAR" stands for Foreign Bank and Financial Accounts Report, a document that is required to be filed with the IRS if: (1) the filer was a U.S. person, defined as a citizen, a resident or a person in and doing business in the United States; (2) the U.S. person had a financial account or accounts that exceeded $10,000 during the calendar year; (3) the financial account was in a foreign country; and (4) the U.S. person had a financial interest in the account or signatory or other authority over the foreign financial account. *See* IRS Form TD F 90-22.1; 31 C.F.R. § 103.

[7] SA Louden testified during the suppression hearing that when she spoke with SA Marrero on April 23, 2003, he indicated that when he found the remittance slips to the State Bank of India "he wasn't sure what they meant or how to even read them." Louden Tr. 5:9-10. *See also* Louden Tr. 47:1-4 ("I mean it was very confusing[,] the HHS agent was not familiar with what a remittance slip looked like. He wasn't even sure if this was in rupees or dollars . . . ."); Louden Tr. 56:11-17 ("They were really unsure of even what it was . . . they had never really—I got the impression they had never seen anything like this before and, you know, they were trying to let me know how do you read something like this."). This alleged confusion

informed her that, on the copies of his 1999, 2000, and 2001 personal tax returns found at his residence, Dr. Srivastava had not checked the appropriate block on the Schedules B to acknowledge these foreign accounts. SA Marrero proceeded to fax SA Louden six pages of documents, which included copies of the wire transfers found by the seizing agents. SA Louden subsequently began an investigation into possible FBAR violations, which ultimately led to a formal investigation regarding possible tax fraud committed by the Defendant.

MOTION TO SUPPRESS

Under the Fourth Amendment to the United States Constitution,

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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is somewhat belied by the memorandum prepared by Special Agent Louden for purposes of this hearing, however, as this memorandum indicates that during her April 23rd conservation with SA Marrero, he indicated that after he observed the Bank of India faxes, the Schedule Bs of Dr. Srivastava's 1999, 2000, and 2001 tax returns were consulted, and he noted that Dr. Srivastava failed to check the Schedule B to acknowledge the foreign bank accounts. This Court finds curious the fact that an individual allegedly uneducated and confused about the significance of overseas wire transfers would have the wherewithal to compare the remittance slips against tax forms to see if the taxpayer's Schedules B acknowledged the foreign bank accounts.

U.S. Const. Amend. IV; *United States v. Stevenson*, 396 F.3d 538, 545 (4th Cir. 2005). The so-called "Warrant Clause" of the Fourth Amendment "categorically prohibits the issuance of any warrant except one *particularly describing* the place to be searched and the persons or things to be seized." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (internal quotations omitted) (emphasis added).

The particularity requirement circumscribes officers' ability to conduct a general search; "by limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.* at 84. Therefore, the particularity requirement "prevents the seizure of one thing under a warrant describing another," and prevents "a general, exploratory rummaging" into a person's property by leaving nothing to the discretion of executing officers. *United States v. Janus Industries*, 48 F.3d 1548, 1553-54 (10th Cir. 1995); *see also Marron v. United States*, 275 U.S. 192, 196 (1927).

Subject to the exceptions discussed below, evidence seized outside the scope of a warrant must be suppressed. *See Weeks v. United States*, 232 U.S. 383, 392-94 (1914) (overruled on other grounds). In those circumstances where officers "grossly exceed the scope of a search warrant in seizing property," a search will be invalidated in its entirety, and all evidence seized will be suppressed. *United States v. Uzenski*, 434 F.3d 690, 706 (4th Cir. 2006). Such "blanket suppression is warranted where the officers engage in a 'fishing expedition for the discovery of incriminating evidence.'" *Id.*

I. Do the financial documents seized from Dr. Srivastava's residence and offices fall within the scope of the warrant?

Dr. Srivastava asserts that agents exceeded the scope of the warrant in conducting their searches and seizing certain financial documents. Noting that there must be some logical nexus between the items named in the warrant and any unnamed evidence seized during the search, *see, e.g., United States v. Gentry*, 642 F.2d 385, 387 (10th Cir. 1981), Dr. Srivastava asserts that the documents seized that the government now seeks to use against him in its tax prosecution had no nexus to the business records listed in the warrant or to health care fraud. The government's position, taken in its opposition to Dr. Srivastava's motion and again at the evidentiary hearing before the undersigned, is that the warrant authorized agents to seize financial records that *either* related to the defendant's business *or* constituted evidence of violations of 18 U.S.C. § 1347.

The government's view of the scope of the warrants is simply untenable. The "Items to be Seized" listed by the warrant were defined as various categories of records "*related to the business of Dr. Pradeep Srivastava . . . which may constitute evidence of violations of Title 18, United States Code, Section 1347.*" (emphasis added). As such, agents were not entitled to seize *any* financial record of any kind, but rather could only seize documents that related to Dr. Srivastava's business *and* that may show in some way that health care fraud had been committed. This view is further supported by the fact that SA Marrero provided Judge Connelly with an affidavit supporting his suspicions that Dr. Srivastava, through his medical practice, had engaged in health care fraud. These possible violations were the only things for which the government had probable cause to search. Ac-

cordingly, the warrants specifically delineated that they authorized the search and seizure of evidence *related to this subject matter* by specifying in the introduction of the warrant that agents were authorized to seize ten categories of documents "including but not limited to, financial, business, patient, insurance and other records related to the [medical practice] . . . *which may constitute evidence of violations of . . . Section 1347.*" (emphasis added). Therefore, in order to fall within the scope of the warrant, a financial record not only had to have some relationship to Dr. Srivastava's business, but it also was subject to the requirement that it may constitute evidence that health care fraud had been committed.

This is not an overly-technical view of this warrant.[8]

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[8] It is true that courts in some cases courts have allowed the seizure of items not specifically described or delineated in the warrant. Many of these cases involve situations where the warrant(s) authorized the search for and seizure of drugs and/or weapons, and in the course of such searches, officers seized personal papers and effects. *See, e.g., United States v. Wardrick*, 350 F.3d 446, 453-54 (4th Cir. 2003) (search warrant authorized seizure of firearms and related items; seizure of defendant's bills and other papers); *Armstrong v. State*, 548 S.W.2d 334, 336 (Ct. Crim. App. Tn. 1977) (warrant for drugs; seizure of checks, bank documents, personal letters); *State v. McGuinn*, 268 S.C. 112, 232 S.E.2d 229, 230 (1977) (warrant for marijuana and drugs only; seizure of letters and photographs). In these cases, courts upheld the seizures of the personal documents on the theory that they were relevant in establishing proof of the defendants' residence in the location where contraband was found. *See, e.g., Wardrick*, 350 F.3d at 453 (seizure of a utility bill, refund notice, and operator's license was proper because such items "constitute[d] evidence linking Wardrick to the premises where the illegal firearms were found."); *Armstrong*, 548 S.W.2d at 336 ("the personal documents were relevant in establishing proof of possession of the premises and ultimately the drugs."); *McGuinn*, 232 S.E.2d at 230 ("*Warden* [*v. Hayden*, 387 U.S. 294 (1967)] requires that there be a nexus between the items seized and some criminal behavior. The letters and photographs helped the police initially establishing

In *United States v. Debbi*, 244 F. Supp. 2d 235 (S.D.N.Y. 2003), the District Court for the Southern District of New York reached such a conclusion in a case involving strikingly similar facts. In *Debbi*, a magistrate judge approved a warrant that authorized the seizure of various treatment records, claim records, financial records, etc., limited to items "in furtherance of: (1) obstruction of justice; (2) the commission of health care fraud and which relate to patients who are covered by Medicare and Medicaid insurance or patients who reside at adult homes." *Id.* at 236. In executing the warrant, the officers seized "numerous personal files (both electronic and paper), general correspondence, financial records, and records relating to Debbi's private patients, i.e., non-Medicare patients who do not reside in adult homes, not to mention numerous records of Mrs. Debbi." *Id.* at 236-37 (internal quotations omitted). Evaluating the Defen-

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who resided at the address . . . [and] . . . served as evidence of actual residency, which was essential in establishing possession and control of the marijuana.").

In this case, there is no such nexus between the financial documents seized from Dr. Srivastava's home and the items described by the warrant. *See Marron*, 275 U.S. at 198 (seizure of ledger and bills for gas, electric, etc., held not authorized by warrant to search for intoxicating liquors and articles for their manufacture). There is no suggestion on the government's behalf that the personal documents were seized to prove possession or ownership of the premises, as was the case in the above-mentioned cases. Furthermore, the government fails to illustrate how these personal financial documents in any way relate to the objects sought in the warrant. *Compare Gentry*, 642 F.2d at 387 (documents describing production of illegal drug seized during search but not listed in warrant had sufficient nexus to warrant, when warrant specifically named the illegal drug as the object of the search). Lacking this nexus, the Defendant's personal financial papers must be excluded as beyond the scope of the warrant. *See United States v. Jones*, 31 F.3d 1304, 1314 (4th Cir. 1994).

dant's motion to suppress, the court observed

> [G]ood faith reliance on a Magistrate's determination of probable cause is no basis to ignorethe plain language of a warrant describing, as required by the Fourth Amendment, what is to be searched and seized; and what here saved the otherwise very broad warrant issued by the Magistrate Judge from overbreadth was its explicit command that the items to be seized be limited to evidence of either obstruction of justice or the commission of health care fraud.

Id. at 237. The court concluded that the materials seized from the Defendant's home, including "personal and religious files, general correspondence, family financial records, private patient records, etc. . . . plainly fell outside these parameters." *Id. Accord United States v. Duong*, 156 F. Supp. 2d 564, 572 (E.D. Va. 2001) (search warrant authorizing evidence relating to robbery plans didn't authorize seizure of personal financial and other papers). So too here, Defendant's brokerage statements, financial spreadsheets, faxes to his CPA, faxes to his bank, and other documents do not in any way relate to the subject matter of the warrant—health care fraud.[9]

The affidavit submitted in support of the warrants in this case detailed suspected health care fraud. This is the only subject for which the police had probable cause

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[9] These items certainly had nothing to do with the facts sworn to in the affidavit and therefore should not have been seized. *See id.* ("[S]eized evidence arguably falling within the broad language [of the warrant] but unrelated to facts stated in the affidavit must be suppressed.").

to search and seize evidence. *Accord Janus Industries*, 48 F.3d at 1553-54 (noting that the particularity requirement "ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause."). As the court in *Debbi* suggested, in a case where there is probable cause only to suspect health care fraud, a search warrant lacking this subject matter limitation would run afoul of the Fourth Amendment particularity requirement by allowing the seizure of *any* business record. *See Debbi*, 244 F. Supp. 2d at 237; *see also United States v. Hickey*, 16 F. Supp. 2d 223, 240 (E.D.N.Y. 1998) (in RICO case, the "unstructured mandates" of warrants authorizing officers to "search all of the business records of each of the defendant corporations and to seize any items that constituted evidence of *any* crime regardless of its nature" were "clearly violative of the Fourth Amendment."); *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (particularity requirement is designed to prevent "a general exploratory rummaging in person's belongings" by focusing the officer conducting the search on the items that are authorized to be seized at a designated location).

The fact that officers executing the search warrants in this case were faced with many personal records does not excuse them from complying with the restrictions and qualifications listed in the warrant. Other courts have observed that "the wholesale seizure for later detailed examination of records not described in a warrant is significantly more intrusive, and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'" *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982) (citing *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980)); *accord United States v. Shilling*, 826 F.2d 1365, 1369 (4th Cir. 1987) (acknowledging substantial practical problems

presented by task of examining "the mass of [defendant]'s records," but noting that "we cannot easily condone the wholesale removal of filing cabinets and documents not covered by the warrant"). *Compare United States v. Sawyer*, 799 F.2d 1494, 1509 (11th Cir. 1986) (in executing warrant for business records indicating scheme to defraud investors, agents carefully confined the search to scope of warrant; agents were instructed that personal records of individuals and other businesses should not be seized; during the search, agent reviewed items seized and determined a quantity of records not covered by the warrant and left them on the premises; employees were allowed to segregate and remove their personal items; documents seized consisted only of business records likely to reveal a pervasive scheme to defraud investors, as specified in the warrant).[10]

To be abundantly clear, the Court finds that the personal financial documents seized from Dr. Srivastava, including his personal bank accounts, spreadsheets reflecting his stock transactions, 1099 forms, etc., *see* Footnote 5, neither tended to show violations of the

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[10] Even if this Court were sympathetic to the government's assertions that Defendant's business and personal records were commingled, this only gets the government past the first qualification listed in ¶ 2 of the warrant (that the records must relate to the business). As discussed above, the government utterly fails to provide a plausible explanation for how the records seized in any way suggested that they related to or suggested evidence of *health care fraud.* Furthermore, initial confusion about the relevance of the documents does not justify their subsequent use against Dr. Srivastava when they are in fact outside the terms of the warrant. *See United States v. Altiere, III,* 2006 WL 515609 (N.D. Ohio March 1, 2006) (while initial seizure of documents not specifically delineated by the warrant may have justified initial seizure for review, the documents are not admissible against the defendant if they are beyond the scope of the warrant).

health care fraud statute, nor related to the business of Dr. Srivastava. At least one document arguably may have related to the business of Dr. Srivastava—the fax to the Bank of India that was recovered from Dr. Srivastava's Greenbelt medical office. However, nothing about this document on its face connotes or suggests evidence of health care fraud. The only suggestion offered by the government that this fax fell within the scope of the warrant can be reduced to the argument that someone who commits health care fraud has to put the money *someplace*, therefore the document *could* show something related to the crime for which the warrant was sought. This justification is unacceptable, as there is no limiter to this interpretation. Under this view, *any* receipt, purchase order, bank statement, might be seized because it might show what Dr. Srivastava may have done with his allegedly illicit funds. This Court is unwilling to accept this limitless interpretation, which would allow the seizure of receipts showing the purchase of a family vacation, a motorcycle, even new articles of clothing as "evidence tending to show violations of 18 U.S.C. § 1347."

Additionally, the government's purported explanation that the agents were interested in the Bank of India faxes because they could possibly show "proceeds" of the alleged health care fraud is unavailing. The affidavit swore out facts suggesting that Dr. Srivastava billed for procedures that were not actually performed, engaged in "double billing" (billing separately for two procedures which should be billed under one code), and falsely diagnosed allegedly healthy individuals with certain cardiac conditions that justified unnecessary treatment. There is not a single word in SA Marrero's affidavit relating to what Dr. Srivastava may have done with the monies he received as payment for his procedures, nor does the affidavit discuss how Dr. Srivastava handled his banking.

In fact, the affidavit provided no probable cause to search for anything regarding how Dr. Srivastava's personal finances were handled. Furthermore, as counsel for the Defendant noted at the suppression hearing, concerns for proceeds of Dr. Srivastava's alleged crimes would involve *money laundering activities*, activities distinct from health care fraud, and evidence of which was not authorized by the warrant here.

This Court therefore finds that the seizure of the Bank of India faxes was not authorized by the warrant. While these documents may have legitimately appeared to be records of the business since they were found on the fax machine of one of Dr. Srivastava's medical offices and were sent on business letterhead, nothing about them could be seen as suggesting possible violations of 18 U.S.C. § 1347. Proceeds handling is not a crime that § 1347 describes, and the warrant simply did not authorize agents to seize anything related to money on the hope that it could show evidence of health care fraud.

Under the facts of this case, the government is stuck between the proverbial rock and a hard place. On one hand, if the warrant is read true to all of its terms and limitations, the agents were only allowed to seize records of the business that tended to evidence health care fraud violations—which Dr. Srivastava's personal and financial papers clearly did not. If, on the other hand, this Court were to accept the government's suggestion that the warrant should be read broadly to allow the seizure of virtually *any* financial document of the Defendant (business or otherwise), the scope of the warrant would become overbroad and violate the particularity requirement of the Fourth Amendment. This Court should construe a warrant in the most commonsense way, which limits the search/seizure to business records that tend to show health care fraud was committed. *Accord Debbi*,

244 F. Supp. 2d at 237. This view is not only proper because it is the most sound reading of the warrant, but also because it is the only reading of the warrant that would allow it to be particular enough to avoid problems of overbreadth. Read in this way, the seizure of personal and financial non-business papers of Dr. Srivastava was not authorized by the terms of the warrant, and such evidence therefore must be suppressed unless it is within the scope of one of the exceptions discussed below.[11]

II. Did seizing agents grossly exceed the scope of the warrant?

Even if this Court were to find that some of the documents at issue here were within the scope of the warrant, these documents would be excluded as well because the conduct of the agents who executed this warrant was so inappropriate as to warrant the exclusion of *all* evidence seized on March 21, 2003. As discussed above, the particularity requirement of the Fourth Amendment is designed to "prevent the seizure of one thing under a warrant describing another." *Marron*, 275

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[11] This Court is aware that officers may also seize articles of an incriminating character that they come across while performing a search in a given area pursuant to a valid search warrant. *See Uzenski*, 434 F.3d at 707. However, the government does not argue, nor can it be contended, that the personal, financial, and other documents seized from Defendant's home were of a readily incriminating nature. *See Horton v. California*, 496 U.S. 128 (1990) ("It is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be 'immediately apparent.'"); *see also United States v. Wells*, 98 F.3d 808, 809-10 (4th Cir. 1996).

U.S. at 196. The Fourth Amendment also extends to the *execution* of search warrants, "such that officers cannot 'grossly exceed the scope of the search warrant in *seizing* property.'" (emphasis in original) *Uzenski*, 434 F.3d at 706, quoting *United States v. Foster*, 100 F.3d 846, 849-50 (10th Cir. 1996) (internal citations and quotations omitted). "As a general rule, if officers executing a search warrant exceed the scope of the warrant, only the improperly-seized evidence will be suppressed . . . ." *United States v. Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000). However, "[i]n extreme circumstances even properly seized evidence may be excluded when the officers executing the warrant exhibit a flagrant disregard for its terms." *Id.*, citing *United States v. Ruhe*, 191 F.3d 376, 383 (4th Cir. 1999) (internal quotation marks omitted). "When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby *requiring suppression of all evidence* seized under that warrant." *United States v. Medlin*, 842 F.2d 1194, 1198-99 (10th Cir. 1988) (emphasis added); *see also Uzenski*, 434 F.3d at 706 ("Blanket suppression is . . . appropriate where the warrant application merely serves as a general subterfuge masking the officers' lack of probable cause for a general search . . . or *where the officers 'flagrantly disregard[ ]' the terms of the warrant.*") (emphasis added).

SA Marrero clearly testified at the suppression hearing that he did not consider himself to be bound by the language of the warrant specifying that agents were to seize only evidence which tended to show violations of § 1347 *and* was a record of Dr. Srivastava's business. When questioned about his view of the warrant, and why he did not consider himself bound by the substantive introductory language that clearly circumscribed the legal scope of the agents' search, SA Marrero provided aston-

ishing testimony in which he indicated that he inserted this boilerplate language merely as a "go by," and that he did not consider it to limit his actions in any way.[12] When asked if it was true that he "didn't give much thought to what this meant" and whether he "just thought it was something some boilerplate that ought to be" in the warrant, SA Marrero agreed "for the most part," stating only that he "knew it was used before so it was appropriate language." Marrero Tr. 39:11-19.

Throughout his testimony, SA Marrero was unequivocal in his belief that he did not consider himself to be limited to seizing business items only, or records that tended to show evidence of violations of the health care fraud statute. In fact, SA Marrero indicated that he *intended* to seize personal financial records and "didn't intend to limit the financial records to business records." Marrero Tr. 42:1-2. Responding to cross examination inquiring about whether he thought the limiting language of the warrant had any meaning, SA Marrero stated "being here I didn't mean to limit the items to just items relating to the business. Otherwise I would not have included the items in paragraph five that's clearly not related to the business."[13] Marrero Tr. 34:18-21. At

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[12] Marrero testified "this introductory paragraph I used from—in many of our cases health care cases we use go byes and this introductory paragraph is a paragraph that I received or got from another attachment to—for another health care fraud search warrant. My intention when I wrote this affidavit was to get the items listed in the numbers but as far as the legalese and the wording, I just wanted to stay consistent with what the court generally got and received and reviewed for attachments and search warrants." Marrero Tr. 33:18-34:2.

[13] Paragraph five of the warrant authorized the seizure of Dr. Srivastava's passports and visas. SA Marrero's testimony indicated that this is "something that [he] do[es] in pretty much all of [his] investigations" because a passport may show that "he could not have

performed [a] service at P.G. hospital because he wasn't there[,] he was overseas," for example. Marrero Tr. 7:15-23. On cross examination, defense counsel probed SA Marrero's logic:

Q: You thought that [Dr. Srivastava] wasn't billing for [heart catheterization procedures] in a correct manner?

A: I thought he was billing for a service that he wasn't providing.

Q: That had to do with the issue of whether he was invading or getting into both chambers of the heart as opposed to just one, right?

A: That's correct.

Q. But that allegation didn't have to do with him billing for wholly fictitious procedures where he was in India and there was no patient in the hospital.

A: No. That allegation had nothing to do with that.

Q: Right. Okay. And in fact, there was no allegation in the affidavit that had to do with him billing for people on days where he wasn't present.

A: No.

Q: All right. So, your indication that you wanted to get passports or visas because that might be the case was something that you just do as a matter of routine not because it was a specific concern in this case, right?

A: That's correct. I do that in most of my cases.

Marrero Tr. 23:7-24:4.

This paragraph of the warrants also authorized the seizure of pictures, and SA Marrero's view on how virtually limitless he saw the warrants' provisions was further borne out in cross examination regarding the authorization to seize photographs.

Q: You told them what they should look for and what they could take.

A: Correct.

* * *

Q: Pictures [?]

the suppression hearing, SA Marrero even went so far as to suggest that the warrant language limiting the search to business records that showed health care fraud was "just an expression," and that "after reading [the warrant] over and over again [he] [still] d[id]n't believe after reading it it limits it to items related to the business." *Id.* 35:7-10. It is clear that SA Marrero was unequivocal

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A: That's what I said. I hope I got that right. I thought that pictures were in here. Yes. Yes, it is.

Q: Okay well pictures of what?

A: This goes back to the same thing. If there's a picture of the doctor on a cruise in the Bahamas on a certain day, that's evidence of—and then I have a bill for service in P.G. Hospital that would be evidence that he was or even a picture at another state that would be evidence that he wasn't there on that day.

A: Well, okay but attachment A doesn't say photographs of Dr. Srivastava anywhere else than being in Prince George's County it just says photographs, doesn't it?

Q: That's?

A: That's correct.

Q: Are you telling me that your oral instructions to the agents were you can seize photographs that show Dr. Srivastava in exotic locations if you can figure out where they are and if you can figure out what the date is?

A: I didn't get into that specificity but that was the purpose and intent of putting that in the attachments and the agents should be aware of that.

Marrero Tr. 29:20-31:4.

SA Marrero's attitude towards the seizure of passports, visas, and photographs of Dr. Srivastava further supports this Court's conclusion that he took an extremely broad, inappropriate view of the warrant. In fact, he admitted that with respect to these items that "it wouldn't matter to [him] whether [Dr. Srivastava's] activities were of a family nature or whether his activities were of a business nature." Marrero Tr. 46:3-8.

in his belief that the limiting words of the warrant were meaningless to him and that he "did not intend to limit [the search or the warrant] to just business records." *Id.* 36:1-3.

For SA Marrero, the "go by" may have only existed for consistency's sake or as a mere formality, but for the judge who issued the warrants and for this Court, this language is certainly not meaningless. As discussed above, the subject matter limitation of evidence related to health care fraud and the limitation that financial papers seized be related somehow to the medical practice of Dr. Srivastava were limitations necessary to make the warrant comport with the particularity requirement of the Fourth Amendment. Nevertheless, SA Marrero approached, and counseled other agents to approach, the search in a way that authorized the seizure of virtually any document of Dr. Srivastava. Simply stated, his view was "whatever financial records if it has [Dr. Srivastava's] name on it . . . the judge gave us the authority to seize financial records [and] we could take it." Marrero Tr. 44:2-4.[14]

SA Marrero's view that he had limitless power to seize virtually anything from Dr. Srivastava's home and business is, at best, troublesome.[15] SA Marrero's expan-

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[14] SA Marrero admitted that he told the agents responsible for executing the three warrants that they could take any financial records, stating "I told them financial records and then I may have—I may have indicated you know tax records or the specific wording that's here, but that's it." Marrero Tr. 32:17-19. When asked whether he informed agents that they were only to take financial records related to Dr. Srivastava's business, which may constitute evidence of violations of 18 U.S.C. § 1347, SA Marrero indicated that he did not inform the agents of this limitation. *Id.* at 32:25-33:10.

[15] The search inventory log, Marrero Exh. 1, reveals that agents seized items including wallets, papers regarding Dr. Srivastava's summer home, uncashed checks, unopened mail, and information

sive view of the warrants and his related approach to the searches, which he imparted to all agents who participated, created a situation where executing agents grossly exceeded the scope of the search warrants.[16] This Court is mindful that it is a rare situation indeed where agents are found to be so excessive in their execution of a search warrant that blanket suppression is warranted, but in light of SA Marrero's alarming testimony,

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regarding his new house. In fact, several large boxes of personal documents voluntarily returned by SA Marrero shortly after the execution of the search were displayed to the Court by Dr. Srivastava's counsel at the suppression hearing. The returned documents included an invitation to a cultural gala, Dr. Srivastava's "CVS ExtraCare" card, his AAA card, and checks from several bank accounts. *See* Marrero Tr. 15:2-5.

[16] This conclusion is further supported in light of volume of documents eventually returned to Dr. Srivastava. Following the execution of the search warrant, an attorney representing Dr. Srivastava contacted SA Marrero and the United States Attorneys' Office expressing his belief that agents exceeded the scope of the search warrant and seized items that were outside its scope. Beginning on March 24, 2003, SA Marrero began to return documents to Dr. Srivastava; on March 24, SA Marrero returned a wallet with three credit cards, some Indian currency, and a patient chart, and on March 26, SA Marrero returned licensing information, a CVS pharmacy card, a AAA card, and various checks. On April 3, 2003, SA Marrero returned computer hard drives to Dr. Srivastava, and on April 24, 2003, SA Marrero returned "many of the boxes and their contents." Marrero Tr. 13:7-14:6. The chain of custody log introduced as an Exhibit at the suppression hearing reveals that "Boxes 1, 2, 3, 18, 5, 16, 7, 4, 15, 6, 10, 17 and items from other boxes" were returned. *See* Marrero Exh. 2. The government's own opposition concedes that "approximately 80 percent of the documents seized from [Dr. Srivastava's] home were returned to him by the investigating agents." *See* Paper no. 14 at 24. It is this Court's conclusion that this large-scale return of information seized from Dr. Srivastava further bears out how SA Marrero's cavalier attitude towards the limitations of the warrant caused agents to grossly exceed its scope.

the undersigned finds inexorable the conclusion that this rare remedy is appropriate in this case. *Accord United States v. Robinson*, 275 F.3d 371, 382 (4th Cir. 2001) (blanket suppression appropriate when "searching officers may be said to have flagrantly disregarded the terms of a warrant [by] engag[ing] in 'indiscriminate fishing' for evidence"). This is not a case where "some seized items were not identified in the warrant," or where "agents exceeded the limits of their authority under the warrant based on practicality considerations or mistake." *Uzenski*, 434 F.3d at 707 (citing *Robinson*, 275 F.3d at 382 (finding no flagrant disregard where most items seized that were outside scope of warrant were found within items of greater evidentiary value—e.g., a grocery list found within an address book authorized under the warrant)); *United States v. Chen*, 979 F.2d 714, 718 (9th Cir. 1992) (finding no flagrant disregard where agents installed additional surveillance camera based on their mistaken belief that the warrant permitted an extra camera and practicality concerns that the first camera could not capture the entire area).

Authority cited by the government itself supports this proposition. In *United States v. Rettig*, 589 F.2d 418, 421 (9th Cir. 1978), a search warrant authorized the seizure of marijuana and related paraphernalia, as well as documentary evidence containing "indicia of the identity of the residents" of the house to be searched. In executing the warrant, officers seized more than 2,000 documents, including "numerous United States government publications, blank applications for various credit cards, bank brochures, medical and dental records, drug store receipts for a period extending over two years prior to the search, photograph slides, undeveloped film, extensive financial records, credit cards and travel documents." *Id.* at 421. Observing that "[a]n examination of the books, papers and personal possessions in a

suspect's residence is an especially sensitive matter," the court concluded that "the record establishes that the agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretations of its provisions." *Id.* at 422-23. So holding, the *Rettig* court concluded that *all* evidence seized during the search must be suppressed. *Id.* at 423. *See also Foster*, 100 F.3d. at 850; *Medlin*, 842 F.2d at 1198 (finding flagrant disregard and granting blanket suppression where officers seized 667 items not specified by the warrant).

Unlike many other cases, this Court believes that the facts here provide "probative indicia of flagrant disregard or bad faith," and therefore finds that the agents' seizure of the many items outside the warrant transformed what should have been a particularized search into a general, unrestricted fishing expedition. *Uzenski*, 434 F.3d at 708. The "rule of excluding all evidence seized in a general search is designed to combat the very mind set displayed by [SA Marrero]. The belief that a search warrant gives an officer free rein to search and seize cannot be tolerated." *United States v. Larson*, 1995 WL 716786, at *7 (D. Kan. Nov. 16, 1995). Condoning SA Marrero's conduct would be "to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J. concurring). Such an unconfined search and indiscriminate seizure is precisely what happened here. Because this Court concludes that SA Marrero approached the searches of Dr. Srivastava's home and offices in a way that flagrantly exceeded the specific limitations of the

warrants, and that the agents grossly exceeded the scope of the warrants in their execution,[17] all evidence seized in the March 21, 2003, searches must be suppressed, unless saved by an applicable exception to the exclusionary rule.

III. Can the illegally seized documents nevertheless be admitted under any exception to the exclusionary rule?

If the evidence taken from Dr. Srivastava's home was not in fact properly seized—either because it was not within the scope of the warrant, or because the searches as a whole were so grossly overbroad as to make all documents seized inadmissible—all fruits derived therefrom must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963). However, in some cases evidence derived from an illegal search may avoid exclusion if it is sufficiently attenuated to dissipate the taint of the initial violation. *United States v. Ceccolini*, 435 U.S. 268, 274-75 (1978) (declining to adopt a "per se" or "but for" rule making inadmissible any evidence that came to light through a chain of causation beginning with a constitutional violation). As the Supreme Court recently observed in *Hudson v. Michigan*,

> The exclusionary rule generates "substan-

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[17] SA Marrero's approach taints the execution of all three search warrants. Each warrant contained the same qualifying language and detailed the same items to be seized, and each warrant was supported by a single affidavit detailing allegations of health care fraud. SA Marrero made clear throughout his testimony that he imparted his overly broad view of the warrant to the entire search team, and agreed that he shared his perceptions with the team at the preparatory meeting. *See* Marrero Tr. 47:5-48:5; Marrero Tr. 53:1-21; Marrero Tr. 74:16-22; *see also* Footnote 14, *supra*.

> tial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application," *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 364-365 (1998) (citation omitted). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, *supra*, at 908, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States v. Calandra*, 414 U.S. 338, 348 (1974)—that is, "where its deterrence benefits outweigh its 'substantial social costs,'" *Scott*, *supra*, at 363 (quoting *Leon*, *supra*, at 907).

547 U.S. 586 (2006). In this case, the government contends that even if the Court finds that agents exceeded the scope of the warrant, such evidence could still be admissible under either the "independent source" or "inevitable discovery" doctrines. Each of these two doctrines will be discussed in turn.

A. Inevitable discovery

Under the inevitable discovery doctrine, information obtained by unlawful means is nonetheless admissible "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). "[T]he exception re-

quires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never happened." *United States v. Eng*, 997 F.2d 987, 990 (2d Cir. 1993) (citations and quotations omitted). Such a finding of "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix*, 467 U.S. at 444-45.

Although the government initially asserted that the inevitable discovery exception might save the evidence at issue in this case, it conceded at oral argument that such an exception is not applicable here. This concession was wise. Although some may envision a behemoth IRS computer that meticulously checks every person's 1099s against income reported on their returns (1040s), this is simply not the case, as the government now concedes.[18] SA Louden of the IRS testified at the evidentiary hearing that to expect the IRS to automatically notice even extremely large discrepancies would be "giving the IRS too much credit as far as what their capabilities are. No offense on the civil side but, I mean, it's—the program is not perfect. The database is not perfect." Louden Tr. 41:18-21.[19] SA Louden later acknowledged that at

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[18] Moreover, capital gains from options trading is not reported to the IRS.

[19] On cross examination, defense counsel probed the reality of the IRS' ability to verify the submission of all taxpayers:

Q: . . . There is something call[ed] [the] IDRS matching program. Do you know about that?

A: No. I don't think I know it called matching program if you explain it to me I might say, oh yes.

Q: Let me try. I've had it happen to me. If you get a 1099 from a bank for interest for $100 and it doesn't appear on your tax return, the computer will notice that and spit out a notice to you and say,

the time that she began looking into Dr. Srivastava's affairs, there was a lot of discussion in the IRS about the fact that the audit rate was so low, a fact attributable in part to the fact that "[t]he IRS was short staffed." Louden Tr. 45:7-15.

In light of this, the government cannot point to any historical and demonstrable facts that justify admitting the documents gathered in the IRS investigation pursuant to the inevitable discovery exception. The government does not, and indeed cannot, make the argument that there was any (much less a sufficiently developed) tax evasion investigation in existence prior to the search of Dr. Srivastava's home and office, and that this investigation would have inevitably gleaned the evidence that the government now seeks to offer against him. This is not, therefore, a situation where "the fact making discovery inevitable . . . arise[s] from circumstances other than those disclosed by the illegal search itself." *United States v. Thomas*, 955 F.2d 207, 211 (4th Cir. 1992).

Furthermore, it cannot be credibly claimed that the improper seizure of Dr. Srivastava's personal and financial documents "played no real part" in the subsequent IRS investigation and discovery of evidence supporting criminal tax evasion charges. *See United States v. Whitehorn*, 813 F.2d 646, 649 n.4 (4th Cir. 1987), *cert. denied*, 487 U.S. 1234 ("the premise of the inevitable discovery doctrine is that the illegal search played no real part in discovery of incriminating evidence. Only then, if

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you know, why isn't this on your tax return? That's the IDRS matching program. [A]re you aware of that?

A: I've never known it to work that efficiently.

Q: Exactly.

Louden Tr. 38:18-39:5.

it can be shown that the taint did not extend to the [subsequent investigation] would the product of the [subsequent investigation] be admissible."). This key limitation, which prevents the government from profiting from its own wrongdoing, is noticeably absent here. The government does not point to any facts supporting the contention that absent the documents seized from Dr. Srivastava's home and business, the IRS would have inevitably investigated him and uncovered all of the evidence at issue. The mere fact that the IRS *might* have audited Dr. Srivastava at some point in the future is insufficient, as the inevitable discovery doctrine requires proof that the evidence *would* have, not merely could have, been discovered.[20] *Morris*, 684 F. Supp. at 416; *see also United States v. Ford*, 184 F.3d 566, 578 (6th Cir. 1999) (rejecting inevitable discovery exception when testimony showed that IRS was not actively investigating defendant's tax records or was otherwise "hot on the trail of the disputed evidence"); *Thomas*, 955 F.2d at 211 (finding inevitable discovery doctrine did not permit admission of evidence seized after surveillance had been set up following illegal entry into defendant's hotel room; "the bank money found in the illegal search changed the whole nature of the investigation that followed.").

B. Independent Source

The independent source doctrine provides another exception to the exclusionary rule. The Supreme Court has held that merely because evidence is unlawfully acquired, "this does not mean that the facts thus attained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved

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[20] Indeed, SA Louden's testimony indicated that the statute of limitations had already run for several of the tax years at issue.

like any others. . . ." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The independent source doctrine rests "upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." *Murray v. United States*, 487 U.S. 533, 542 (1988). As the Supreme Court observed in *Nix*,

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

467 U.S. at 443. This doctrine saves from exclusion evidence that has been discovered by means "wholly independent of any constitutional violation." *Id.* Put another way, where agents engage in investigative activity that is later determined to be illegal, evidence is still admissible if discovered through a source independent of the illegality. *See Murray*, 487 U.S. at 537.

To evaluate whether the independent source exception applies, the Court must determine "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary

taint."[21] *Wong Sun*, 371 U.S. at 488. Relevant factors include (1) the time between any illegal action and the later acquisition of evidence, (2) intervening circumstances and (3) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *United States v. Seidman*, 156 F.3d 542, 548 (4th Cir. 1998). Courts must "careful[ly] sift[ ] [through] the unique facts and circumstances" of each case to make a finding with respect to whether the alleged "independent" source is sufficiently attenuated. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). The ultimate burden of proving admission of tainted evidence rests on the government. *Seidman*, 156 F.3d at 548 (citing *Schneckloth*, 412 U.S. at 238).

1. The development of the allegedly "independent" IRS investigation

As discussed above, agents executing the search of Dr. Srivastava's Greenbelt office came upon faxes confirming the transfer of funds to an account at the Bank of India. Elton Malone, the search warrant team leader at the Greenbelt site, called SA Marrero on his cell phone while Marrero was conducting the search at Dr. Srivastava's Oxon Hill office and informed him that one of the agents located faxes showing transactions over-

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[21] "The exclusionary rule does not require the exclusion of evidence 'when the causal connection between [the] illegal police conduct and the procurement of [the] evidence is "so attenuated as to dissipate the taint" of the illegal action.'" *United States v. Liss*, 103 F.3d 617, 620 (7th Cir. 1997); *see also United States v. Najjar*, 300 F.3d 466, 477 (4th Cir. 2002) ("not all evidence conceivably derived from an illegal search need be suppressed if it is somehow attenuated enough from the violation to dissipate the taint."). In other words, under the "independent source" doctrine, suppression of physical evidence under the Fourth Amendment does not convey derivative use immunity.

seas involving foreign bank accounts. Marrero Tr. 9:17-22. Agent Malone indicated that the transactions appeared to involve a substantial amount of money, and asked SA Marrero if he was aware of this. SA Marrero informed him that he was not, but would inform the Assistant United States Attorney handling Dr. Srivastava's case; he did so the same day.

On April 23, 2003, the United States Attorneys' Office related this information to SSA Bradley Whites, the IRS agent in charge of the agency's Wheaton, Maryland office. Specifically, the United States Attorneys' Office informed SSA Whites that there was some evidence of significant money going overseas and that it did not appear that the appropriate box on Dr. Srivastava's Schedule B had been checked. Louden Tr. 2:21-3:1. SSA Whites met with SA Louden, related this information, provided her with SA Marrero's name and phone number, and asked her to follow up with Marrero. Louden Tr. 4:21-22. This same day, SA Louden spoke with SA Marrero regarding the faxes showing the transfer of money to the State Bank of India, and later that same day SA Marrero faxed SA Louden these papers. After receiving this information, SA Louden requested information on Dr. Srivastava using the IRS' Integrated Data Retrieval System ("IDRS"), a database that allows the agency to view online tax return information. Louden Tr. 6:13-17. SA Louden also testified that she looked into the treasury enforcement communication system to verify if Dr. Srivastava had disclosed any foreign bank accounts, and observed that he had not. Louden Tr. 8:1-8.

SA Louden received Dr. Srivastava's IDRS information on April 25, and certain information on the IDRS summary sheet caught her eye. SA Louden testified that the summary sheet on the IDRS printout normally

displays how many dollars in interest income the taxpayer earned, but in this case, the section of the report that displayed income from 1099B activity (stock and bond activity), displayed only stars (" * * * * * * ") and no numerical data. After consulting with someone more familiar with the IDRS system, SA Louden learned that the stars represented an extremely large number that was too big to print on the summary form. Louden Tr. 9:15-24. To receive further information, on April 25, 2003, SA Louden requested a second round of IDRS so that she could examine the detailed information from Dr. Srivastava's 1099B forms (which show capital gains). SA Louden testified that she received the 1099B information relating to the capital gains on June 12, 2003. Louden Tr. 11:25. On July 10, 2003, SA Louden began to do a comparison with the Dr. Srivastava's 1099Bs and his reported tax returns.

On May 19, 2003, the United States Attorneys' Office formally invited the IRS to join the existing grand jury investigation into Dr. Srivastava. Once the tax and health care fraud investigations were joined, SA Louden requested (through the United States Attorneys' Office) that the grand jury issue several subpoenas to banks with whom Dr. Srivastava did business; these were issued on June 2, 2003. She testified that in determining what subpoenas to request, "generally the schedule B is a good place" because it gives accounts; SA Louden also indicated that "in this particular case [she] believe[d] that Jason [Marrero] had faxed [her] over some bank accounts that he had identified from the search warrant evidence."[22] Louden Tr. 14:10-19.

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[22] This testimony is consistent with her explanation of where the specific account information came from for the individual subpoenas of the financial institutions. SA Louden testified "I can't exactly remember. Some of this information came from Jason [Marrero] I

Three days after these subpoenas were issued, SA Louden traveled on June 5, 2003, with IRS SA Grytzer to meet SA Marrero at the Rockville office of HHS. SA Louden testified that during that meeting, the agents examined evidence that Marrero and his team had recovered from the search of Dr. Srivastava's home and businesses. Specifically, she indicated that she and the other agents "went into a room, and then these boxes were pulled, and [they] basically just looked through the boxes to see kind of what he had and make heads or tails of it."[23] Louden Tr. 25:1-4. During her review of the

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believe who had located some information and I believe what I—when he sent me that fax, I verified it to my Schedule B and said, oh, yes I see there is Bentley Lawrence or National—you know City Corp. And then also the actual 1099Bs later the—the 1099Bs actually show the account number on them as well and I can't remember if the 1099 dividends show the account number but they definitely show the bank . . . ." Louden Tr. 16:6-15.

It bears special emphasis, and will be discussed later, that SA Louden *twice* admitted that some of the information she received regarding what subpoenas to issue was given to her by SA Marrero. While SA Louden indicated that she also relied on Dr. Srivastava's Schedules B of his tax returns to uncover the names of financial institutions she wished to subpoena, this Court notes that some of the financial institutions subpoenaed on June 2, 2003, do not appear to be listed in Dr. Srivastava's Schedules B. *Compare* Hearing Exhs. Louden 1 and Louden 3 (Dr. Srivastava's 1998 and 1999 Federal Income Tax Returns) *with* Hearing Exhs. Louden 5-Louden 16 (subpoenas for various financial institutions). This strongly suggests to this Court that SA Marrero did in fact provide additional information that would not have been otherwise known to SA Louden, specifically, the names of financial institutions with which Dr. Srivastava did business, and that this information helped to guide SA Louden's investigation. If this is true, it only further supports this Court's conclusion that the independent source exception does not apply in this case.

[23] SA Marrero had previously returned many documents taken during the searches. *See* Footnote 16, *supra*.

documents in SA Marrero's possession, SA Louden examined a fax relating to Dr. Srivastava's Bentley Lawrence accounts. SA Louden testified that this 12 page fax related to the 1998 tax year and showed account transactions and short term capital gains and losses. Louden Tr. 26:12-16. SA Louden further testified that she also reviewed certain spreadsheets in SA Marrero's possession concerning Dr. Srivastava, which contained a record of Dr. Srivastava's financial transactions and "showed few capitol *[sic]* losses but overall capitol *[sic]* gains." Louden Tr. 27:10-15. Upon finding these documents, SA Louden testified that her "original thoughts were, I have to validate they're accurate so I had to go through each transaction and make sure it was a legitimate transaction . . . using the statements." Louden Tr. 27: 25-28:6. Comparing these documents and spreadsheets against Dr. Srivastava's tax returns, SA Louden found what appeared to be over $40 million in unreported capital gain income. Louden Tr. 28:10-11. As her investigation continued, SA Louden met with Dr. Srivastava's CPA and stockbroker to further her tax investigation. SA Louden then spent several months doing capital gains calculations to recalculate the true gains and losses realized by Dr. Srivastava. Louden Tr. 32:24-33:5. Her efforts culminated in the present indictment alleging income tax evasion and the filing of a false income tax return.

2. Application of the independent source doctrine

Considering the factual development of the IRS investigation, the government contends that this Court need not exclude the financial records seized from Dr. Srivastava's home and business. In addressing the factors set forth in *Brown*, the government asserts that while the IRS investigation was close in time to the exe-

cution of the search warrant, it was completely separate and proper. The government explains that:

> days, weeks and months passed between the execution of the warrants and the acquisition of all of the IRS's documentary evidence. There were numerous intervening circumstances, particularly SA Louden's lawful use of IRS investigative resources and grand jury subpoenas. Finally, defendant does not even allege that SA Louden's investigation—the investigation that led to the indictment—involved any official misconduct, let alone intentional or flagrant misconduct. Accordingly, copies of seized documents that were obtained from independent sources during the subsequent IRS investigation should not be suppressed.

As such, the government asserts that notwithstanding any constitutional violations committed in the execution of the warrant, the fruits of the IRS investigation should not be excluded. *See United States v. Watson*, 950 F.2d 505, 508 (8th Cir. 1991) ("where a law enforcement officer merely recommends investigation of a particular individual based on suspicions arising serendipitously from an illegal search, the causal connection is sufficiently attenuated so as to purse the later investigation of any taint from the original illegality.").

Dr. Srivastava, on the other hand, suggests that in order to be truly independent of evidence seized during an illegal search, there must be *no* causal connection between the second source of the contested material and the illegal search. *See Segura v. United States*, 468 U.S. 796, 815 (1984) (holding that the independent source exception applied because information possessed by the

agents *before* they illegally entered and searched an apartment constituted an independent source for the discovery and seizure of the evidence later challenged). In this case, Dr. Srivastava asserts that the IRS had no knowledge, much less independent knowledge, of Dr. Srivastava's personal financial situation before the HHS agents executed their searches and provided certain items to the IRS. Therefore, he maintains that the tax investigation was not truly "independent."

As is often the case, the truth lies somewhere between these two interpretations. Although the independent source rule can save from suppression evidence that would not have been uncovered "but for" an illegal search (evidence that therefore has *some* causal connection), the doctrine is not as broad as the government asserts. As this Court, Judge Murray presiding, observed in *United States v. Morris*,

> [w]here courts have applied the independent source doctrine to admit evidence arguably tainted by unlawful police conduct, there has been a showing that the evidence *was in fact obtained through an independent source and not through exploitation of the unconstitutional behavior.*

684 F. Supp. 412, 416 (D. Md. 1988) (emphasis added). This comports with the Supreme Court's view of the independent source doctrine. *See e.g.*, *Murray*, 487 U.S. at 542 (holding that evidence seized pursuant to a subsequently issued warrant, although initially discovered during an illegal search, is admissible so long as "the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue").

An examination of cases where evidence has been admitted under the independent source doctrine illustrates the critical point that, to be admissible under this exception, the so-called independent source must retain a critical degree of separation from the tainted source. In *Segura*, for example, the Supreme Court held that this exception applied because no information obtained during the initial (illegal) entry into the defendant's apartment was needed or used by the agents to secure the warrant under which the disputed evidence was ultimately seized. 468 U.S. at 815 (1984). The Court concluded that "[t]he illegal entry into the [defendants] home did not contribute in any way to discovery of the evidence . . ." because it was "beyond dispute that the information possessed by the agents *before* they entered the apartment constituted an independent source for the discovery and seizure of evidence now challenged." *Id.* at 815-16. (emphasis added). *See also United States v. Williams*, 400 F.3d 1023, 1025 (7th Cir. 2005) (independent source doctrine applied because there was no causal link between the warrantless search of defendant's residence and decision to seek a warrant); *United States v. Walton*, 56 F.3d 551, 554 (4th Cir. 1995) (reasoning that a lengthy prior investigation of the defendant demonstrated the necessary attenuation and independent basis of probable cause to apply the independent source doctrine); *United States v. Curtis*, 931 F.2d 1011, 1014 (4th Cir. 1991), *cert. denied*, 502 U.S. 881 (1991) (denying motion to suppress because the information used to secure a search warrant was independent of any evidence found during the warrantless search); *United States v. Palumbo*, 742 F.2d 656, 661 (1st Cir. 1984) (valid search warrant based entirely on probable cause learned prior to original, putatively unlawful, entry into defendant's premises), *cert. denied*, 469 U.S. 1114 (1985).

These cases suggest that courts apply the independent source doctrine when *untainted evidence* does, in fact, provide an *independent* basis for the discovery of evidence. It is therefore essential that there must have been *an independent basis for the discovery of challenged evidence*, not merely that the information merely *had* an independent existence. *Accord United States v. Brainard*, 690 F.2d 1117, 1126 (4th Cir. 1982) (list of defendant's clients and employees improperly obtained by SEC investigator admissible because information in list was independently obtained by materials subpoenaed by the grand jury *prior to* receipt of tainted documents from other investigation); *United States v. David*, 943 F. Supp. 1403, 1417 (finding agents' decision to further investigate defendant was not prompted by discovery of a firearm in the allegedly unlawful search). This view of the independent source rule protects its integrity and prevents this exception from swallowing the exclusionary rule.[24]

In order to be admissible under the independent source doctrine, the connection between the original illegality and the evidence at issue must be sufficiently attenuated so as to dissipate the taint of the illegal search. *See Nardone v. United States*, 308 U.S. 338, 341 (1939). Here, the primary taint has not been purged because the evidence procured by SA Louden clearly "has been come at by exploitation of (the primary) illegality." *Wong Sun*, 371 U.S. at 488. Indeed, the primary illegality was not attenuated, but rather was repeatedly exploited. Only

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[24] Treatises recognize that "the independent source limitation operates even where there is a de facto causal connection between the proffered evidence and the initial illegality to render the proffered evidence admissible where it is also the product of a *concurrent investigative process in no way dependent upon information learned through lawless official acts.*" 43 A.L.R.3d 485 (emphasis added).

after she received the Bank of India faxes and analyzed those money transfers did SA Louden request the IDRS information on Dr. Srivastava and begin to delve into his tax returns. In fact, SA Marrero specifically informed SA Louden that the boxes on Dr. Srivastava's Schedules B (copies of which SA Marrero seized from his residence) were not checked to reflect his ownership of any foreign bank accounts. This sharing of information is particularly salient in tax cases:

> The unique circumstances of an income tax investigation make a decision to focus intensively of critical importance. As opposed to crimes like assault or robbery, tax evasion is hidden. There are at least hundreds of thousands of tax violators whose criminality has not been revealed. One of the chief problems for the government is to decide how it is going to utilize its limited tax investigation forces. The main hope of a tax violator is that the Internal Revenue Service will remain unaware of his existence. Once the government begins to concentrate all its enormous resources on a citizen, the chance of its discovering that he has violated the tax laws is greatly multiplied. It is difficult to perceive how the government could receive any more valuable information than the name of a probable tax violator.

United States v. Schipani, 289 F. Supp. 43, 62-63 (E.D.N.Y. 1968) (overruled on other grounds). SA Louden exploited the information provided to by SA Marrero by using it to seek IRDS information, and later recover copies of Dr. Srivastava's tax returns and other

financial papers. This evidence therefore cannot be considered independent.

The government cites to the Eighth Circuit case of *United States v. Watson* for the proposition that "where a law enforcement officer merely recommends an investigation of a particular individual based on suspicions arising serendipitously from an illegal search, the causal connection is sufficiently attenuated so as to purge the later investigation of any taint from the original illegality." 950 F.2d 505, 508 (8th Cir. 1991). Another district court later recognized, however, that the *Watson* Court did not explicitly apply the *Wong Sun* standard. *See Larson*, 1995 WL 716786, at *8. *Larson* is factually similar to this case; there, officers reviewed illegally seized documents which revealed that defendant had transacted with numerous financial institutions using various aliases, and discovered the names of several financial instructions dealing with the defendant. Acting on this information, law enforcement visited the financial institutions and subpoenaed their records listing defendant and his aliases; the government later sought to admit this evidence against defendant at trial. Considering this factual development, the *Larson* court concluded that the evidence was not sufficiently attenuated because "the information in the illegally seized documents was exploited to obtain the financial records for which the government seeks admission." *Id.* at *9. The government attempted to argue that the financial records were obtained by sufficiently distinguishable means because they were secured through grand jury subpoenas. The court disagreed, noting that at least some of the documents produced to the grand jury were copies of the very documents that were illegally seized. The court concluded that "the government's choice to use the documents produced in response to the grand jury subpoena does not render perforce those documents 'ob-

tained by means sufficiently distinguishable from the prior illegality.'"[25] *Id.*

Such is the case here. Although the evidence illegally seized from Dr. Srivastava's home and offices subsequently has been obtained through SA Louden's investigation and grand jury subpoenas, this is not sufficiently attenuated to justify its admission. As in *Larson*, SA Louden exploited the information in the illegally seized documents to obtain the financial records that the government now seeks to admit. It is only because of the exploitation of the information displayed in the Bank of India faxes and taxpayer copies of Dr. Srivastava's tax forms (which were examined by seizing agents) that SA Louden initiated her IDRS request. Furthermore, SA Louden twice admitted at the suppression hearing that she received specific bank names from SA Marrero indicating which financial institutions she should subpoena for further information. *See* Louden Tr. 14:10-19 (stating that to determine what subpoenas to request the U.S. Attorneys office issue, "in this particular case I believe that Jason [Marrero] had faxed me over some bank accounts that he had identified from the search warrant evidence."); Louden Tr. 16:6-15 ("Some of this information [used to determine what financial institutions to subpoena] came from Jason [Marrero]."). Finally, SA Louden also testified that once her investigation began she actually met with SA Marrero and reviewed the seized documents in HHS custody. In perusing these boxes, SA Louden uncovered a fax regarding capital gains from 1998 and several spreadsheets showing capital gain income *which she then utilized to compare*

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[25] The *Larson* court ultimately concluded that there was an independent source for the documents, however, because the bank manager conducted his own investigation into defendant and his accounts.

against Dr. Srivastava's filed tax returns and uncover discrepancies.

In this case, there is not just an initial taint; instead, the taint here is *continuous.* In light of this initial and continual taint, the Court is nonplussed by the government's suggestion that because the IRS investigation secured copies of the documents initially seized, the documents need not be suppressed. The financial and tax documents that the government seeks to introduce at trial, even if they are later—acquired *copies* of the documents illegally seized during the March 20th search, are off limits because they were not obtained by means sufficiently distinguishable from the prior illegality.[26]

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[26] It is also problematic for the government's position that where courts have applied the independent source doctrine to admit evidence arguably tainted by unlawful police conduct, they "have emphasized the necessity of showing that the evidence *would* have been uncovered independently; not merely that it *could* have been." *Morris*, 684 F. Supp. at 416 (evidence supporting conviction would not have been independently or inevitably discovered and should have been suppressed) (emphasis added); *see also Wardrick*, 350 F.3d. at 451 (applying independent source doctrine where officer "had an *earlier*, independent source for th[e] information"). Here, Defendant asserts that there is no evidence that the IRS had, could have, or would have initiated a criminal tax investigation of Dr. Srivastava absent information and documents passed on by SA Marrero, and that therefore this exception should not apply. As was the case in *Morris*, nothing supports a finding that the IRS *would have* commenced the investigation before it received the financial information that was illegally-obtained. 684 F. Supp. at 415 (no evidence that officers intended to or actually would have searched vehicle where contraband was found before they discovered a pistol in defendant's purse in an unconstitutional search).

In *United States v. Guarino*, 610 F. Supp. 371 (D.R.I. 1984), the government, pursuant to a warrant issued for materials that violated the obscenity laws, seized "all printed material from the [defendant's] offices including records of various companies run by the

Although the government cited *United States v. Najjar* only parenthetically in its opposition to Dr. Srivastava's motion, it sought to rely primarily on this case at the suppression hearing to support the proposition that the independent source doctrine saves the documents at issue here from exclusion. 300 F.3d 466 (4th Cir. 2002). In *Najjar*, a defendant sought suppression of evidence obtained through two warrants, arguing that much of the evidence used to secure these warrants derived from the execution of an invalid search. Officers investigating a chopshop had conducted a search that was later found to be illegal; those officers shared automobile salvage certificates found during the first illegal search with another law enforcement officer, who began an internal investigation into another officer. These salvage certificates were ultimately dead ends because the investigating officer found no log records or incident reports to trace the certificates to activities of the person

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Defendant . . . pension files, [and] personal papers . . . ." *Id.* at 375. Records of the defendant's various businesses were turned over to the IRS, which, unlike the instant case, had been investigating the defendant prior to the illegal search. Notwithstanding the previously initiated IRS investigation, the *Guarino* court rejected the government's "general assertion that the 'natural progression' of the IRS investigation would have uncovered those business documents" seized in the illegal search because "[t]he record fails to indicate . . . that the Government had sufficient knowledge, prior to the search, regarding the various companies apparently controlled by the defendant, to be able to subpoena those particular documents." *Id.* at 379-80. Like *Guarino*, here the subsequently obtained documents were summonsed only after the illegal search; the government's own chronology demonstrates that SA Louden's 'standard investigative techniques' were dormant until awakened by impermissibly seized evidence. In fact, this case is even more clear cut than *Guarino*, as in that case the IRS *already had begun* an investigation into the defendant. As previously discussed, here, no such investigation existed, making the independent source exception even more illusory.

under investigation. The investigator then had to regroup and approached his investigation from another angle, broadening his inquiry into other illicit activities similar to those suggested by the illegally seized certificates. In light of these facts, the *Najjar* court rejected defendant's contention that suppression was necessary merely because "the illegally obtained evidence tended significantly to direct the evidence in question." *Id.* at 479.

Several critical distinctions emerge between the facts of *Najjar* and the facts of this case. First, in *Najjar*, the government did not seek to introduce the illegally seized salvage certificates, but rather sought the admission of *other* evidence that came to light through later independent investigation. In comparison, here the government seeks to introduce *the very evidence that was illegally seized in the first instance.* Second, in this case there was no impediment that caused the IRS to reach a dead end and begin a new investigative chain. In *Najjar*, the court explicitly found that the "investigation was not a simple matter of looking at salvage certificates and obtaining new evidence from their use, rather it was a substantial investigative effort unconnected to the seized documents themselves once [the investigating officer] encountered the impediment at the Maryland State Police barracks." *Id.* at 479. Here, SA Louden's investigation *was* "a simple matter of looking at [the Bank of India faxes] and obtaining new evidence from their use." *Id.* There was no impediment leading to a totally new investigative focus; rather, each piece of evidence was acquired in direct response to analysis of the previous information. All of this is directly traceable, with no attenuation, to the evidence illegally seized.

SA Louden's testimony revealed a third, fatal, factor that by itself completely removes this case from *Najjar*

and the independent source doctrine. She testified that she based her subpoena requests both on Schedule B information she recovered from the IDRS system *and* on names that SA Marrero provided to her as institutions that would be of interest to her tax investigation. Additionally, nearly two months after her tax investigation commenced, she traveled to an HHS office and met with SA Marrero to review the documents that this Court now holds were illegally seized from Dr. Srivastava. SA Louden perused the documents in SA Marrero's possession, and used spreadsheets and a fax found there to help further flesh out the alleged tax fraud committed by Dr. Srivastava. Using these statements, she discovered an apparent underreporting of $40 million in capital gain income. Louden Tr. 28:6-11. SA Louden's investigation therefore not only started as the fruit of the poisonous tree, but also she returned to the proverbial tree for additional tainted fruit.

Thus, attenuation is not present here because unlike in *Najjar*, there was further significant contact and interaction between the supposedly "independent" investigation and the tainted source. It is one thing to say that a later investigation is sufficiently independent and attenuated when the illegally seized evidence does not directly generate any information for the "independent" source, and there is no continued contact between the "independent" source and the tainted evidence. It is quite another thing to suggest that so long as another government agency secures the same evidence as the tainted evidence, such evidence need not be excluded, even if the "independent" source continued to interact with the tainted evidence. Application of the independent source doctrine and *Najjar* is unavailing where the illegally seized evidence is used directly and repeatedly to generate the evidence at issue, and the supposedly independent agent returns to the poisonous tree for yet

more helpings of the forbidden fruit. *Accord United States v. Pope*, at *4 ("Because the traffic stop was fruit and thus contaminated with illegitimacy, the evidence subsequently secured as a result was thus also unlawfully acquired.").

The Court therefore concludes that the IRS investigation is too closely connected to the initial illegal seizure, and is not "so attenuated as to dissipate the taint" of the illegal seizure. *Nardone*, 308 U.S. at 341. Application of the *Brown* factors supports this conclusion. Here, as a result of the sharing of financial information seized from Defendant, SA Louden of the IRS was conducting a full blown criminal tax investigation within *six weeks* (factor one: time between investigations). SA Louden's investigative techniques detailed by the government cannot possibly be considered to be "intervening circumstances" because they were done in direct response to the information received from SA Marrero. Indeed, SA Louden admitted that she based her subpoena requests in part on SA Marrero's suggestions, and even met with him during her investigation to discuss the evidence and review other documents that were impermissibly seized. Investigating agents here therefore did substantially more than in the cases relied upon by the government, in that SA Marrero recommended an investigation, provided the IRS with documents to start such an investigation, provided the IRS with specific account names, and met with the IRS during the course of its investigation (factor two: intervening circumstances). *Accord Larson*, 1995 WL 716786, at *8 (rejecting application of *Watson* when information in illegally seized documents was pursued and exploited to obtain financial records that government sought to use against defendant). Although there are no allegations of official misconduct on the part of SA Louden, this absence does not make an otherwise closely-related investigation sufficiently attenuated for

the purposes of this exception to the exclusionary rule (factor three: official misconduct).

Because all of the investigative steps taken by the IRS were taken, directly or indirectly, as a result of the illegal search, and because the taint of the illegal seizure was reinforced by the continued interaction between SA Marrero and SA Louden, this Court concludes that all documents generated by the IRS investigation are tainted, not independent, and must be excluded.

CONCLUSION

The exclusionary rule has exacted a mighty toll in this case. Although this Court is troubled by its determination that the motion to suppress should be granted, this conclusion was driven by precedent and compelled by the facts of this case. Although it is no doubt unsettling that Dr. Srivastava may escape criminal accountability because of the blunders of law enforcement, this is the rare and unfortunate case where such a price must be paid. As Justice Clark acknowledged, "In some cases, this will undoubtedly be the result. But . . . 'there is another consideration—the imperative of judicial integrity.' The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (citation omitted). With great disappointment, and for the reasons discussed above, the Court will, by separate order, grant Dr. Srivastava's Motion to Suppress.

ORDER

Upon consideration of the Plaintiff's Motion for An Evidentiary Hearing Pursuant to *Franks v. Delaware* and to Suppress Evidence [Paper no. 13], the opposition

thereto, the arguments presented by counsel at hearings before the undersigned on March 27, 2006, and June 19, 2006, for the reasons stated on the record on March 27, 2006, and for the reasons stated in the accompanying opinion, it is this 4th day of August, 2006, by the United States District Court for the District of Maryland,

ORDERED, that Plaintiff's Motion for an Evidentiary Hearing Pursuant to *Franks v. Delaware* and to Suppress Evidence [Paper no. 13] is **GRANTED IN PART** and **DENIED IN PART;** and it is further

ORDERED, that Plaintiff's Motion for an Evidentiary Hearing Pursuant to *Franks v. Delaware* and to Suppress Evidence [Paper no. 13] is **DENIED** to the extent it seeks an evidentiary hearing pursuant to *Franks v. Delaware*; and it is further

ORDERED, that Plaintiff's Motion for an Evidentiary Hearing Pursuant to *Franks v. Delaware* and to Suppress Evidence [Paper no. 13] is **GRANTED** to the extent that it seeks the suppression of evidence; and it is further

ORDERED, that all evidence seized by government agents on March 21, 2003, pursuant to three search warrants signed by Magistrate Judge Connelly on March 20, 2003, including but not limited to

1. Spreadsheet detailing options transactions on Bentley-Lawrence ("BL") Account;

2. Spreadsheet detailing stock transactions on BL Account, labeled "Corporate;"

3. Spreadsheet detailing options transactions on Speer Leeds account;

4. Spreadsheet detailing stock transactions;

5. Schedule of realized gains and losses;

6. Form 1099 activity detail for BL account;

7. Form 1099 activity detail for BL account;

8. Form 1099 activity detail for BL account;

9. Fax from CPA requesting information to prepare tax return;

10. Tax reporting statement to support capital gains;

11. Form 1099 activity detail supporting capital gains;

12. Handwritten bank interest and payments statement;

13. Tax reporting statement to support capital gains;

14. Form 1099 activity detail to support capital gains;

15. Fax to CPA detailing BL accounts;

16. Form 1099 activity detail supporting capital gains;

17. Tax reporting statement to support capital gains;

18. Form 1099 activity detail to support capital gains;

19. Tax reporting statement to support capital gains;

20. Fax from CPA requesting items to complete tax return;

21. Handwritten list of dividends and interest from bank accounts;

22. Tax reporting statement to support capital gains;

23. Tax reporting statement to support capital gains;

24. Spreadsheet for capital gains;

25. Email from stock broker detailing stock activity;

is hereby **SUPPRESSED.**

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Criminal No. RWT 05-0482

UNITED STATES OF AMERICA, Plaintiff,

v.

PRADEEP SRIVASTAVA, Defendant.

March 6, 2007

MEMORANDUM OPINION AND ORDER

TITUS, District Judge.

On August 4, 2006, this Court issued an opinion and order granting a motion to suppress filed by Defendant, Dr. Pradeep Srivastava ("Srivastava") based on its conclusion that the evidence in question had been obtained in violation of the Fourth Amendment. *United States v. Srivastava*, 444 F. Supp. 2d 385 (D. Md. 2006). The Government has filed a Motion for Reconsideration, which Srivastava has opposed. For the reasons stated below, and for the reasons stated in the Court's August 4, 2006 opinion, the Government's Motion will be denied.

BACKGROUND

In light of the August 4, 2006 opinion that details the facts of this case at length, the Court will not repeat the extensive factual background here. However, it is worth noting several salient facts that inform this opinion.

The Defendant in this case is a cardiologist who resides in Potomac, Maryland and who practices medicine through a Subchapter S Corporation, Pradeep Srivastava, M.D., P.C. Special agents from the Department of Health and Human Services, Office of Inspector General ("HHS-OIG"), the Federal Bureau of Investigation and the Office of Personnel Management, Office of Inspector General conducted the initial stages of a health care fraud investigation of Dr. Srivastava. That investigation ultimately led to criminal tax charges against Dr. Srivastava that are now before the Court.

On March 20, 2003, Special Agent ("SA") Jason Marrero of HHS-OIG submitted a single affidavit in support of applications for three search warrants to Magistrate Judge William Connelly. The affidavit in support of the warrants included allegations that Dr. Srivastava billed for services not rendered to patients, billed patients for duplicate services, listed inappropriate codes on patient claims, improperly billed patients for incidental services, and/or altered medical records. Judge Connelly approved all three warrants, two of which applied to Dr. Srivastava's medical offices in Greenbelt and Oxon Hill, and the third of which authorized a search of Dr. Srivastava's residence in Potomac. Each warrant contained identical substantive language that authorized the seizure of a list of enumerated "records including, but not limited to, financial business, patient and other records related to" the Defendant's "business . . . which

may constitute evidence of violations of Title 18, United States Code, Section 1347."[1]

After the searches were completed, SA Marrero forwarded to the United States Attorney's Office a copy of faxes to the New York office of the Bank of India found at Dr. Srivastava's Greenbelt location. The U.S. Attorney's Office subsequently related this information to Supervisory Special Agent ("SSA") Brad Whites of the IRS, who then conveyed the Srivastava documents and information to IRS Special Agent ("SA") Meredith Louden. The HHS agents also faxed SA Louden six pages of documents, which included copies of the Bank of India faxes found by the seizing agents. SA Louden subsequently began an investigation, which ultimately led to a formal investigation regarding possible tax fraud committed by the Defendant.

STANDARD OF REVIEW

The Federal Rules of Criminal Procedure do not expressly provide for Motions to Alter or Amend Judg-

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[1] Section 1347 provides that, "[w]hoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services,

shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both." 18 U.S.C. § 1347.

ment. *United States v. Greenwood*, 974 F.2d 1449, 1468 (5th Cir. 1992). However, federal courts to consider the issue have relied upon Rule 59 of the Federal Rules of Civil Procedure as an "apt analogy." *Id. See also, U.S. v. Fell*, 372 F. Supp. 2d 773, 779-80 (D. Vt. 2005), *United States v. D'Armond*, 80 F. Supp. 2d 1157, 1170 (D. Kan. 1999).[2]

Rule 59(e) allows an aggrieved party to file a motion to alter or amend a judgment within ten days of its entry. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). As there is no provision in the Federal Rules of Criminal Procedure governing motions for reconsideration, the Court, by analogy, will be guided by the standard established in the Civil Rules. Courts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not previously available, or (3) to correct a clear error of law. *Zinkand v. Brown*, 478 F.3d 634, 636-37, 2007 WL 611972, at *2-3 (4th Cir. 2007). "Where the motion [to reconsider] is nothing more than a request that the district court change its mind . . . it is not authorized . . . ." *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

ANALYSIS

As the Defendant correctly points out, the Government ignores the standard of review in its Motion and instead alleges that "[D]efendant never discusses the ac-

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[2] Such motions are recognized under the Maryland Rules, which apply the Rule 59 standard to Motions for Reconsideration filed by the State after a Court has granted a Motion to Suppress. Md. Rule 4-252(h)(2).

tual text of Attachment A and cites no case to justify the suppression of the Bank of India fax. Srivastava's failure to defend the suppression order demonstrates why the court should reconsider the case." Government's Reply at 2.

Assuming that the Government intended to assert the third basis for reconsideration in its Motion, namely that the Court must correct a clear error of law, the Court has reviewed the merits. The Government raises six main arguments in its Motion for Reconsideration: (1) the Court incorrectly interpreted the warrant, (2) the documents were not seized unlawfully, (3) more documents are "related to" Srivastava's business than the Court concluded because Srivastava operates a Subchapter S Corporation, (4) the evidence obtained in the IRS investigation was lawful, (5) the evidence should not have been suppressed under the independent source and the inevitable discovery doctrines, and (6) specifically, the Bank of India faxes should not have been suppressed. This Court addressed all of these arguments in the August 4, 2006 opinion, and will not revisit the entire opinion here. With respect to the first and third arguments, however, the Government has repackaged some of its analysis which warrants further discussion.

A. The Search Warrant

The Court explained at length its reading of the warrant in the August 4, 2006 opinion. In its Motion for Reconsideration, the Government spends a great deal of time suggesting that the modifying clauses "related to the business" and "may constitute evidence of violations of . . . Section 1347" should not be viewed as limits on the types of documents that could be seized from Srivastava's home and offices. The Court finds that reading the warrant so as to give meaning to these two

clauses is not a "restrictive reading" as the Government alleges. Government's Motion at 5. Rather, these clauses must be read to limit the scope of the warrant in order to save it from what otherwise would be unconstitutional overbreadth. *United States v. Srivastava*, 444 F. Supp. 2d 385, 393 (D. Md. 2006); *see also United States v. Debbi*, 244 F. Supp. 2d 235, 237 (S.D.N.Y. 2003) (finding, on similar facts, that "what here saved the otherwise very broad warrant issued by the Magistrate Judge from overbreadth was its explicit command that the items to be seized be limited to evidence of either obstruction of justice or the commission of health care fraud").

The Government goes on to cite a number of cases to support the proposition that the warrant was not an unconstitutional general warrant without the limiting language. For example, it cites to *Andresen v. Maryland*, 427 U.S. 463, 480 n.10 (1976), and *United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982), for the proposition that the Government should be given greater flexibility when investigating complex financial crimes that involve a so-called "paper puzzle." But this flexibility relates to the application of the particularity requirement of the warrant. *Wuagneux*, 683 F.2d at 1349 ("[i]t is universally recognized that the particularity requirement must be applied with a practical margin of flexibility"). It is curious that the Government cites to these cases when this Court ultimately found that the language of the warrant satisfied the particularity requirement and was not overly broad.

It its Motion for Reconsideration, the Government only superficially addresses the fact that the Court's interpretation of the warrant was only one of three key points in the Court's analysis. This Court only determined that suppression was appropriate because of two

additional and important factors. First, the quantity of the materials seized is significant; the Government seized multiple boxes of documents from Srivastava's home and office. The Government in fact realized that many of the documents seized were not related to the investigation. It later returned many of the seized documents to Srivastava, although not until tax investigators had had an opportunity to review the contents. Second, the Court found SA Marrero's testimony to be quite elucidating.

The Government tries to couch SA Marrero's testimony as merely one agent's "state of mind," Government's Reply at 1. However, it is clear to the Court that SA Marrero believed the express limitations of the search warrant were meaningless, and certainly not restrictions that would limit his conduct in any way. *Srivastava*, 444 F. Supp. 2d at 399. Indeed, his actions far exceeded the words of the warrants that he secured from Judge Connelly. SA Marrero specifically testified that he did not advise his agents on any limits regarding what they could collect, and thus his testimony is much more than a single agent's state of mind. *Id.* Marrero's instruction (or lack thereof) resulted in the seizure of many documents that obviously were not authorized by the warrant such as an invitation to a cultural event and Srivastava's personal CVS "Extra Care" card. *Srivastava*, 444 F. Supp. 2d at 399 n.15. Thus the Court's suppression order was rooted in the actions of the seizing agents who grossly exceeded the scope of the warrants, and not simply the interpretation of the text of the warrants and accompanying affidavit. The warrants, as interpreted by this Court, were appropriately limited and circumscribed consistent with the Fourth Amendment; SA Marrero's execution of the warrants was without any limits or circumscription whatsoever.

B. Documents "Related To" Srivastava's Subchapter S Corporation

In its Motion for Reconsideration, the Government argues that the type of corporation operated by Srivastava is somehow significant with respect to the volumes of documents collected by the agents, including the Bank of India faxes. The Government states, "[d]efendant's medical practice was organized as a Subchapter S corporation, and he declared his income from the corporation on his individual tax return." Government's Motion at 18. As the defendant correctly points out in his Opposition, the type of corporation operated by Srivastava is of no consequence. "Thousands—if not millions—of businesses in this country operate as S corporations; that fact makes it no more or less difficult to identify a corporate transaction than it would if Dr. Srivastava practiced through a P.C. set up as a C Corporation. Nor is it unusual for a busy professional to have some business records at home." Defendant's Opposition at 13.

Regardless of the type of business entity operated by Srivastava, the agents should not have seized personal financial records and tax returns, and they should not have seized business records unless they tended to show violations of 18 U.S.C. § 1347.[3] These were the two simple and basic restrictions contained in the warrant, but disregarded by SA Marrero. Additionally, it is clear from his testimony that it is not as if the agents became confused during the search as to whether the documents were business or personal—they went on a wholesale fishing expedition and seized all documents and many

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[3] SA Marrero's affidavit, attached to the search warrant, claimed that Dr. Srivastava was not properly describing procedures and diagnoses in his patient bills. *Srivastava*, 444 F. Supp. 2d at 390.

other personal effects at the direction of SA Marrero, without regard to whether the documents or other items were business records or demonstrative of health care fraud. *Srivastava*, 444 F. Supp. 2d at 397-98.

To support the notion that some of the documents collected tended to show health care fraud, the Government argues, as it did during the suppression hearing, that the "tax returns, brokerage and bank statements, and other documents demonstrating a defendant's income from a lucrative occupation and the disposition of that income may constitute health evidence of fraud." Government's Motion at 12. But the case to which the Government cites in support of this proposition, *United States v. Jackson-Randolph*, 282 F.3d 369, 377 (6th Cir. 2002), specifically states that "[t]he relevance of this evidence is to create 'the inference that the defendant does not possess a legitimate source of income to support his affluent lifestyle . . .'" (quoting *U.S. v. Carter*, 969 F.2d 197, 201 (6th Cir. 1992)).

While it is true that "[s]ometimes . . . evidence of extreme wealth or extravagant spending is admissible under the Federal Rules of Evidence," such evidence cannot be said to be evidence of health care fraud in this instance. *Jackson-Randolph*, 282 F.3d at 377. As a cardiologist, Dr. Srivastava was engaged in a legitimate and lucrative profession, unlike a typical drug dealer who has no legitimate source of income that would support an affluent lifestyle. As such, this Court rejects this so-called "proceeds of the crime" argument raised by the Government. *Srivastava*, 444 F. Supp. 2d at 395. If this Court were to follow the Government's argument to its logical end, and accept that Srivastava's financial statements could be seized as evidence of money earned from allegedly fraudulent practices, the Court would have to embrace the notion that agents executing a warrant

could seize any and all financial papers from anyone suspected of committing a fraud. Such a broad reading would start the Court down a slippery slope indeed, and essentially make any warrant restrictions meaningless in fraud cases. "This argument would allow virtually unlimited seizure of a lifetime's worth of documentation, which would be extremely intrusive. Moreover, the impracticability of tracing the origin of every dollar [the defendant] owned to show whether it came from some enterprise other than [the crime], casts doubt on whether the government really means to take on such a herculean task. At any rate, this rationale was not articulated in the affidavit, and therefore we need not decide whether it would have provided a justification for the warrant if it had been presented to the magistrate." *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999). The rationale that the financial records and tax returns seized were related to the Section 1347 investigation is also negated by the fact that the Government returned "approximately 80 percent" of the seized documents to Srivastava. *Srivastava*, 444 F. Supp. 2d at 399 n.16.

Because the acts of the agents blatantly exceeded the scope of the warrant, this Court ordered suppression of the evidence in accordance with well-established Fourth Amendment jurisprudence. *United States v. Uzenski*, 434 F.3d 690, 706 (4th Cir. 2006) ("Blanket suppression is therefore appropriate where the warrant application merely serves as a subterfuge masking the officers' lack of probable cause for a general search . . . or where the officers flagrantly disregard the terms of the warrant.") (citations omitted); *United States v. Ruhe*, 191 F.3d 376, 383 (4th Cir. 1999) ("In extreme circumstances even properly seized evidence may be excluded when the officers executing the warrant exhibit a "flagrant disregard for its terms.") (quoting *United States v. Jones*, 31 F.3d 1304, 1314 (4th Cir. 1994)); *United States v. Foster*, 100

F.3d 846, 849-850 (10th Cir. 1996) ("[w]hen law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant") (quoting *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988)).

For these reasons, and for the reasons stated in the August 4, 2006 Opinion, it is this 6th day of March, 2007, by the District Court for the District of Maryland **ORDERED** that the Government's Motion for Reconsideration [Paper No. 29] is hereby **DENIED**.

No. 08-1152

In the Supreme Court of the United States

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that blanket suppression of all the evidence seized was inappropriate after determining that the search warrants authorized the seizure of petitioner's personal financial records and made no determination that any evidence was seized unconstitutionally.

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In the Supreme Court of the United States

No. 08-1152

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 540 F.3d 277. The opinion of the district court (Pet. App. 33a-83a) is reported at 444 F. Supp. 2d 385, and its opinion denying the government's motion for reconsideration (Pet. App. 84a-94a) is reported at 476 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2008. A petition for rehearing was denied on October 14, 2008. Pet. App. 32a. On December 31, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 2009. On January 29, 2009, the Chief Justice further extended the time until March 13, 2009, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Maryland on two counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). Before trial, petitioner moved to suppress financial records that had been seized from his residence and two medical offices and were to be used as evidence. The district court granted the motion, ordering the suppression of the documents and all other evidence seized in the searches. The court of appeals reversed the district court and remanded for further proceedings. Petitioner now seeks review of that interlocutory judgment.

1. Petitioner is a licensed cardiologist who lives in Potomac, Maryland, and conducts his medical practice through Pradeep Srivastava, M.D., P.C., a Subchapter S Corporation. Gov't C.A. Br. 3. In early 2003, the Department of Health and Human Services (HHS) and other federal agencies initiated a criminal investigation into an alleged health care fraud scheme involving petitioner. Petitioner, along with his associates, were suspected of submitting false claims to various health care benefit programs, in violation of 18 U.S.C. 1347. Pet. App. 2a-3a.

In March 2003, HHS Special Agent Jason Marrero applied for warrants to search petitioner's medical offices in Greenbelt and Oxon Hill, Maryland, and his residence in Potomac. The applications were supported by a 19-page affidavit, in which Agent Marrero established that he had probable cause to believe that "fruits, evi-

dence and instrumentalities of false claim submissions" by petitioner's medical group to health care benefit programs were located in petitioner's medical offices and residence.[1] Pet. App. 3a-4a.

On March 20, 2003, a magistrate judge issued the three requested search warrants. Each warrant was accompanied by an identical two-page "Attachment A," captioned "Items To Be Seized Pursuant To A Search Warrant." Attachment A detailed ten categories of documents and records to be seized at each location, "including, but not limited to, financial, business, patient, insurance and other records related to the business of [petitioner and his two associates], for the period January 1, 1998 to Present, which may constitute evidence of violations of Title 18, United States Code, Section 1347." As is relevant here, the warrants specifically authorized the seizure of "[f]inancial records, including but not limited to accounting records, tax records, accounts receivable logs and ledgers, banking records, and other records reflecting income and expenditures of the business." Pet. App. 4a-6a.

On March 21, 2003, federal agents simultaneously executed the search warrants at petitioner's offices and residence. Before the searches were conducted, Agent Marrero briefed the executing officers and summarized for them the contents of the warrants and affidavit. The officers seized documents at each location, but only the searches of petitioner's residence and his Greenbelt office led to the seizure of records specifically at issue here. From petitioner's residence, "the officers seized,

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[1] With respect to petitioner's residence, the affidavit explained that petitioner did most of the insurance billing from his home and that his residence was listed as the billing address for claims submitted electronically to Medicare. Pet. App. 3a-4a.

inter alia, copies of [petitioner's] tax returns; stock brokerage account records; information about the construction of a second home; bank records relating to several family financial transactions; travel information; [petitioner's] wallet; unopened mail; credit cards; Indian currency; a pharmacy card; and checks from various banks."[2] Pet. App. 7a (emphasis added). From petitioner's Greenbelt office, the officers seized, *inter alia*, copies of facsimile transmissions on business stationary directing wire transfers to the State Bank of India and copies of bank remittance records relating to the State Bank of India. Those records indicated that petitioner had, between 1999 and 2000, transferred more than $4 million to the State Bank of India. *Id.* at 7a-8a; Gov't C.A. Br. 6.

After the searches were completed, Agent Marrero advised the United States Attorney's Office of the contents of the Bank of India records. In April 2003, the United States Attorney's Office provided copies of the documents to the Internal Revenue Service (IRS). Because the documents suggested a possible violation of federal treasury regulations, namely the failure to disclose a foreign financial account, the IRS commenced its own investigation. In the course of that investigation, the IRS determined that petitioner had failed to report any foreign bank accounts on his 1999, 2000, and 2001 personal income tax returns. In so doing, petitioner concealed more than $40 million in capital gains on in-

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[2] Shortly after the searches were conducted, and pursuant to an agreement between the parties, the government returned to petitioner approximately 80% of the documents that had been seized from his residence, including some Indian currency, the pharmacy card, and various checks. Pet. App. 55a n.16. In doing so, the government did not concede that the records had been improperly seized. *Id.* at 8a & n.6.

vestments in technology stocks and stock options. Pet. App. 8a-9a.

2. On October 12, 2005, a federal grand jury sitting in the District of Maryland returned an indictment charging petitioner with two counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of making false statements on a tax return, in violation of 26 U.S.C. 7206(1). The indictment alleged that petitioner underpaid his income taxes by more than $16 million for tax years 1998 and 1999 and that petitioner failed to disclose certain short-term capital losses on his tax return for 2000.[3] Pet. App. 9a, 34a n.1; Gov't C.A. Br. 12-13.

On January 21, 2006, petitioner filed a motion to suppress the evidence seized in the searches. Petitioner contended that the officers exceeded the scope of the warrants by seizing documents and records that were not related to his business or evidence of health care fraud. Pet. App. 9a-10a, 41a. As is relevant here, the government responded that the warrants authorized the seizure of the documents it intended to use at trial—specifically, 25 financial records (including personal tax documents) seized from petitioner's residence and the Bank of India records seized from petitioner's Greenbelt office. See *id.* at 10a-12a, 37a n.5 (identifying relevant documents).

3. On August 4, 2006, after an evidentiary hearing where it heard testimony from Agent Marrero and an IRS agent, the district court granted petitioner's motion and ordered the suppression of the financial records

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[3] Petitioner has not been criminally charged with health care fraud. In July 2007, however, petitioner agreed to pay the United States $476,000 to settle claims that he fraudulently billed federal health care programs between 1999 and 2003. Pet. App. 34a n.2; Gov't C.A. Reply Br. 4-5 & n.1.

seized from petitioner's residence, the Bank of India records seized from the Greenbelt office, and all other evidence seized in the three searches. The court began by finding that, under the terms of the warrant, the officers were only authorized to seize "documents that related to [petitioner's] business and that may show in some way that health care fraud had been committed." Pet. App. 41a (emphasis omitted).

With respect to the personal financial records seized at petitioner's residence, such as his "personal bank accounts, spreadsheets reflecting his stock transactions, [and] 1099 forms," the district court held that those documents "neither tended to show violations of the health care fraud statute, nor related to the business of [petitioner]." Pet. App. 46a-47a. Accordingly, the court determined that the records were not within the scope of the warrant and should be suppressed. As for the Bank of India records, the court acknowledged that those documents "arguably may have related to the business of [petitioner]." *Id.* at 47a. The court concluded, however, that those documents should also be suppressed because "nothing about them could be seen as suggesting possible violations of 18 U.S.C. 1347." *Id.* at 47a-48a.

The district court further held that, even if the warrants authorized the seizure of some of the documents at issue, suppression was nonetheless required because "the conduct of the agents who executed [the warrants] was so inappropriate as to warrant the exclusion of *all* evidence seized on March 21, 2003." Pet. App. 49a. The court based its blanket suppression holding on two factors. First, the court found that, based on his testimony at the evidentiary hearing, Agent Marrero "did not consider himself to be bound by the language of the warrant specifying that agents were to seize only evi-

dence which tended to show violations of § 1347 *and* was a record of [petitioner's] business." *Id.* at 50a. The court emphasized that Agent Marrero "indicated that he *intended* to seize personal financial records and didn't intend to limit the financial records to business records."[4] *Id.* at 51a (internal quotation marks omitted). Second, the court determined that the "executing agents grossly exceeded the scope of the search warrants." *Id.* at 55a. In addition to the seizure of the specific documents at issue here, the court relied on the fact that the government eventually returned approximately 80% of the records seized at petitioner's residence. The court concluded that such a "large-scale return of information" demonstrated the grossly excessive nature of the searches. *Id.* at 55a n.16. Because the court believed that the "agents' seizure of the many items outside the warrant transformed what should have been a particularized search into a general, unrestricted fishing expedition," it held that such flagrant disregard for the warrants' limitations required blanket suppression of all the evidence seized. *Id.* at 57a.

Finally, the district court found that no exception to the exclusionary rule, such as the inevitable discovery or independent source doctrines, was applicable here. Pet. App. 58a-81a. The district court later denied the government's motion for reconsideration. *Id.* at 84a-94a.

4. The court of appeals vacated and remanded for further proceedings, holding that the documents the government sought to use as evidence were within the

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[4] The district court also found that Agent Marrero's "approach taint[ed] the execution of all three search warrants" because the warrants were essentially identical and Agent Marrero was the officer who briefed the other agents before the searches were conducted. Pet. App. 58a n.17.

scope of the warrants and that the district court had erred in ordering blanket suppression. Pet. App. 1a-31a.

The court of appeals began by noting that it agreed with the district court that the search warrants authorized the seizure only of those documents that were related to petitioner's business and that may have constituted evidence of health care fraud. Pet. App. 18a. It also emphasized that search warrants are "not to be assessed in a hypertechnical manner," but rather should be read "in a commonsense and realistic fashion." *Id.* at 21a (internal quotation marks omitted). In light of those principles, the court then addressed whether the specific documents at issue were covered by the warrants.

With respect to the personal financial documents seized from petitioner's residence, the court of appeals held that the district court erred in finding that those records were "neither business-related nor evidence of health care fraud." Pet. App. 19a. As to the first requirement, the court noted that petitioner's medical practice was operated as a Subchapter S corporation, which meant that petitioner's "portion of the practice's income was passed through and taxed directly to him as an individual." *Id.* at 22a. Consequently, the court held, it was reasonable for the officers executing the warrant to "deem the financial records relating to the medical practice as being nearly synonymous with the financial records of [petitioner] individually." *Id.* at 22a-23a. As to the second requirement, the court of appeals made clear that, in order to be subject to seizure, the documents "were not required, on their face, to necessarily constitute evidence of health care fraud—rather, they only potentially had to be evidence of such fraud." *Id.* at 24a. Noting that a "time-honored concept in white-collar and fraud investigations is simply to 'follow the

money,'" the court held that petitioner's personal financial records, which reveal the magnitude of the funds he possessed and the manner of their acquisition, plainly satisfied the requirement that they "may" constitute evidence of health care fraud. *Id.* at 24a-25a. The court accordingly held that the seizure of documents from petitioner's residence was consistent with the scope of the warrant and the mandate of the Fourth Amendment. *Id.* at 25a.

With respect to the Bank of India records seized from petitioner's Greenbelt office, the court of appeals held that the district court erred in finding that those documents did not constitute potential evidence of health care fraud. In accordance with its "follow the money" observation, the court of appeals stated that "the financial records of a suspect may well be highly probative of violations of a federal fraud statute," and the district court was mistaken in suggesting otherwise. Pet. App. 26a; *id.* at 26a-27a (noting that, in the context of a fraud investigation, "the financial and accounting records of the suspects—and, as here, records reflecting the overseas transfer of large sums of money by a prime suspect—are potentially compelling evidence that the scheme has been conducted and carried out, and that, in the terms of § 1347, 'money or property' has been obtained as the result of false or fraudulent billing practices"). As a result, the court found that the Bank of India records were properly seized. *Id.* at 27a.

Having determined that the documents at issue were within the scope of the warrants, the court of appeals next examined the district court's blanket suppression order. The court noted that, "as a general rule, if officers executing a search warrant exceed the scope of the warrant, only the improperly-seized evidence will be

suppressed; the properly-seized evidence remains admissible." Pet. App. 28a (quoting *United States* v. *Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001)). The court further emphasized that blanket suppression is only warranted in "extraordinary circumstances," such as when "officers flagrantly disregard the terms of the warrant by engaging in a fishing expedition for the discovery of incriminating evidence." *Ibid.* (internal quotation marks omitted).

The court of appeals held that it was "unable to identify any extraordinary circumstances" that justified blanket suppression here. Pet. App. 29a. It noted that the district court's conclusion that the executing officers had grossly exceeded the scope of the warrants was based largely on the view that the agents had improperly seized petitioner's personal financial records and that Agent Marrero had "intended" to seize such documents. *Ibid.* But those justifications, the court of appeals observed, were "substantially undercut[]" by its determination that those documents were, in fact, within the scope of the warrants. *Ibid.* The court of appeals also rejected the district court's reliance on the fact that the government returned to petitioner approximately 80% of the documents seized from the residence, noting that the mere fact that property seized pursuant to a valid warrant was voluntarily returned "does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Id.* at 30a n.20.

Finally, the court of appeals held that even assuming Agent Marrero subjectively believed that he was not limited by the terms of the warrant, as the district court found, "such an assumption does not support the blanket suppression ruling." Pet. App. 29a. This was because "a constitutional violation does not arise when the actions

of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463 (1985)) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken." (internal citations omitted)). Because the court of appeals determined that no constitutional violation had occurred, it concluded that Agent Marrero's subjective belief as to the scope of the warrants was irrelevant. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-23) that all of the evidence seized pursuant to the search warrants should have been suppressed. The court of appeals correctly held otherwise, and its ruling does not conflict with any decision by this Court or any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals reversed a pretrial suppression order and remanded the case to the district court for further proceedings. Pet. App. 31a. Petitioner has not yet gone to trial. The lack of any final judgment below is "a fact that of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (explaining that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen* v. *Bangor &*

Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007). That salutary practice, which promotes judicial efficiency and prevents unnecessary trial delays, should be followed here. If petitioner is acquitted at trial, his claim that all the evidence seized from the searches should be suppressed will be moot. In contrast, if petitioner is convicted and his conviction is affirmed on appeal, he will be able to reassert his current claim, together with any other legal challenges to his conviction and sentence he may have, in a single petition. Accordingly, review by this Court would be premature at this juncture.[5]

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[5] Petitioner contends (Pet. 22) that it would be "inequitable" for the government to suggest that review should be denied because of the interlocutory posture of this case when the government itself had initiated interlocutory review under 18 U.S.C. 3731. That claim is unfounded. The government has a statutory right to bring an interlocutory appeal from the suppression of evidence because double jeopardy would preclude an appeal if the government went to trial without the evidence and petitioner were acquitted. A defendant, in contrast, has no right of interlocutory appeal because an order denying suppression can be appealed at the conclusion of a case if it ends in conviction. See *United States* v. *Williams*, 413 F.3d 347, 354 (3d Cir. 2005). The ruling of the court of appeals restores petitioner to the same position that he would have occupied if the district court had denied suppression. There is nothing inequitable about asking petitioner to follow the rules generally applicable to criminal defendants and wait until the end of his case to present his claims to this Court in one petition.

2. Petitioner asserts (Pet. 8-14) that the "court of appeals' decision deepens a conflict among the federal courts of appeals and state courts of last resort concerning the validity and application of the 'flagrant disregard' doctrine," particularly on the "relevance of officers' subjective views to the analysis." Pet. 8. This case does not present an occasion for resolving the alleged conflict, and no further review is warranted.

a. Under the Fourth Amendment, a warrant must "particularly describ[e] the place to be searched[] and the persons or things to be seized." U.S. Const. Amend. IV. The principal purpose of the particularity requirement is to prevent general searches. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.*; see also *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976); *Marron* v. *United States*, 275 U.S. 192, 196 (1927).

The principles underlying the particularity requirement extend to the execution of a warrant. As this Court has held, "if the scope of the search exceeds that permitted by the terms of a validly issued warrant * * * , the subsequent seizure is unconstitutional without more." *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (quoting *Horton* v. *California*, 496 U.S. 128, 140 (1990)). Thus, absent some exception to the exclusionary rule, evidence seized that was not authorized by the warrant will be suppressed.

When a warranted search yields both properly seized evidence and improperly seized evidence, however, the

courts of appeals have consistently held that, "as a general rule, * * * only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible." Pet. App. 28a (quoting *United States* v. *Squillacote*, 221 F.3d 542, 556 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001)); see, *e.g.*, *United States* v. *Hamie*, 165 F.3d 80, 84 (1st Cir. 1999); *United States* v. *Chen*, 979 F.2d 714, 717 (9th Cir. 1992) (citing *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1982)); *Marvin* v. *United States*, 732 F.2d 669, 674 (8th Cir. 1984); *United States* v. *Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982). This Court has recognized the validity of those decisions. See *Waller* v. *Georgia*, 467 U.S. 39, 44 n.3 (1984).

Notwithstanding that basic approach, most courts of appeals have recognized a narrow exception to the general rule of partial suppression. According to those courts, total suppression is required, including for items that were within a warrant's scope, if the officers demonstrated a "flagrant disregard for the limitations in a warrant" and thereby "transform[ed] an otherwise valid search into a general one." *Heldt*, 668 F.2d at 1259 (citing *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978)); see, *e.g.*, *United States* v. *Liu*, 239 F.3d 138, 141 (2d Cir. 2000) (noting that "blanket suppression" is warranted when a search "is essentially indistinguishable from a general search"), cert. denied, 534 U.S. 816 (2001); *United States* v. *Foster*, 100 F.3d 846, 853 (10th Cir. 1996); *Chen*, 979 F.2d at 717; *Marvin*, 732 F.3d at 674.

The courts of appeals are in agreement, however, that use of a blanket suppression remedy should be re-

served for only the most extraordinary circumstances. It has been said to be justified only in those "extreme situations" where, despite the existence of a validly issued warrant, the investigators engaged in a "fishing expedition" that resembled the indiscriminate rummaging associated with general searches. *Hamie*, 165 F.3d at 83-84; see, *e.g.*, *United States* v. *Hill*, 322 F.3d 301, 306 (4th Cir.), cert. denied, 540 U.S. 894 (2003); *Chen*, 979 F.2d at 717. But blanket suppression is to be the rare exception, not the rule. See *Foster*, 100 F.3d at 852 (noting that blanket suppression should be "exceedingly rare").

b. Even assuming, as petitioner contends, that the courts of appeals have adopted varying approaches to the "flagrant disregard" doctrine and the relevance of an executing officer's subjective intent to that analysis, this case does not implicate any such conflict. This is because no court of appeals, including those that purportedly consider subjective intent, would have ordered blanket suppression on the facts of this case.

Although many courts of appeals have recognized the existence of the "flagrant disregard" doctrine, only three published federal appellate decisions appear to have applied the doctrine in favor of blanket suppression. See *United States* v. *Rettig*, 589 F.2d 418 (9th Cir. 1978); *United States* v. *Medlin*, 842 F.2d 1194 (10th Cir. 1988); *United States* v. *Foster*, 100 F.3d 846 (10th Cir. 1996); see also 2 Wayne R. LaFave, *Search and Seizure* § 4.10, at 769 n.189 (4th ed. 2004). Each of those decisions is plainly distinguishable from the present case.

In *Rettig*, the Ninth Circuit held that all the evidence seized during a warranted search of a residence must be suppressed because the warrant, "[a]s interpreted and executed by the agents," "became an instrument for con-

ducting a general search." 589 F.2d at 423. Specifically, the court found that the seizure of 2288 items, the "vast majority" of which were written materials, "substantially exceeded any reasonable interpretation" of a warrant that authorized the seizure of marijuana drug paraphernalia and indicia of residency in the home being searched. *Id.* at 421, 423. Similarly, in *Medlin*, the Tenth Circuit found that the agents flagrantly disregarded the limiting terms of a warrant when they seized "667 items of property none of which were identified in the warrant authorizing the search." 842 F.2d at 1196, 1199. Because the officers "employed the execution of the federal search warrant as a 'fishing expedition,'" and thereby "transformed" a valid warrant into a "general warrant," the court held that blanket suppression was required. *Id.* at 1199. Finally, in *Foster*, the Tenth Circuit held that total suppression was necessary where officers, executing a warrant that authorized the seizure of marijuana and four firearms from a residence, seized "anything of value" from defendant's home, regardless of whether it was specified in the warrant. 100 F.3d at 849-853. The court explained that such a search was, in essence, "a general search conducted in flagrant disregard for the terms of the warrant." *Id.* at 853. Accordingly, the court upheld the blanket suppression order.

Unlike those three cases, the court of appeals here did not find that the agents "grossly exceeded" the scope of the warrant or otherwise "transformed" a valid warrant into an instrument for conducting a "general search." Indeed, the court of appeals rejected the district court's interpretation of the warrants and held that petitioner's personal financial documents were within the scope of the warrants and, therefore, properly seized by the executing officers. Pet. App. 22a-23a. Based on

the court of appeals' interpretation, which petitioner does not presently challenge, the bulk of the records identified by the district court as exceeding the warrants' scope, such as petitioner's "personal bank accounts, spreadsheets reflecting his stock transactions, 1099 forms, etc.," *id.* at 46a, actually fell squarely within the warrants' terms.[6] Because the district court's "flagrant disregard" finding was premised on its mistaken interpretation of the warrants' limitations, the court of appeals correctly observed that its reading of the warrants "substantially undercut[]" the district court's rationale for blanket suppression. *Id.* at 29a. Thus, contrary to the district court's finding, the executing agents did not grossly exceed the scope of the warrants; therefore, unlike the cases that have ordered blanket suppression, the searches here were not transformed into an impermissible general search. Given that finding, the court of appeals correctly held that total suppression was not warranted.

The court of appeals' decision is also consistent with the rulings of those courts that have recognized, but not applied, the flagrant disregard exception. Those courts have stated that blanket suppression is appropriate only where the executing officer's violation of a warrant is so extreme that it "transform[s] an otherwise valid search into a general one." *Heldt*, 668 F.2d at 1259; *Hamie*, 165 F.3d at 83-84; *United States* v. *Liu*, 239 F.3d 138, 141-142 (2d Cir. 2000); *United States* v. *Robinson*, 275 F.3d 371, 381-382 (4th Cir. 2001), cert. denied, 535 U.S. 1006,

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[6] As for the documents voluntarily returned to petitioner, which the district court relied on as evidence of a grossly excessive search, the court of appeals rejected any such inference and held that there was no evidence that the "initial seizure" of those records "was unconstitutional." Pet. App. 30a n.20.

and 535 U.S. 1070 (2002); *United States* v. *Garcia*, 496 F.3d 495, 507-508 (6th Cir. 2007); *Marvin*, 732 F.2d at 674-675; *Wuagneux*, 683 F.2d at 1352-1353. For the reasons discussed above, the searches conducted here did not constitute a general search.

Critically, no court of appeals has indicated that total suppression would be appropriate absent some underlying constitutional violation, a finding that is noticeably lacking here. See, *e.g.*, *Marvin*, 732 F.2d at 674 ("Even if there was an unlawful seizure beyond the limitations of the warrant, a question we do not reach, the [defendants] have not made a sufficient showing to require that all documents seized during the search of the clinic be returned."); *Hamie*, 165 F.3d at 83-84; *Liu*, 239 F.3d at 141-142; *Wuagneux*, 683 F.2d at 1354; *United States* v. *Lambert*, 771 F.2d 83, 93 (6th Cir.), cert. denied, 474 U.S. 1034 (1985); see *Scott* v. *United States*, 436 U.S. 128, 135-136 (1978) ("determining whether application of the exclusionary rule is appropriate" takes place "*after* a statutory or constitutional violation has been established"). As petitioner acknowledges (Pet. 16), "a constitutional violation does not arise when the actions of the executing officers are objectively reasonable and within the ambit of warrants issued by a judicial officer." Pet. App. 29a. The court of appeals correctly articulated that principle and, in accordance with it, did not find that any constitutional violation had taken place during the searches. *Ibid.*

Moreover, each document or record the government seeks to introduce as evidence at trial was held to be properly seized pursuant to the search warrants. That fact further distinguishes this case from those that ordered blanket suppression and strongly counsels against the imposition of any total suppression remedy.

See *United States* v. *Schandl*, 947 F.2d 462, 465 (11th Cir. 1991) (noting that "seizure of items not covered by a warrant does not automatically invalidate an otherwise valid search" and that "[t]his is especially true where the extra-warrant items were not received into evidence against the defendant"), cert. denied, 504 U.S. 975 (1992); see also *Waller*, 467 U.S. at 43 n.3 (finding "there is certainly no requirement that lawfully seized evidence be suppressed" when defendant contends "only that the police unlawfully seized and took away items unconnected to the prosecution").

In sum, the court of appeals did not find that the executing officers had grossly exceeded the scope of their search, or otherwise transformed a valid search into a general one. To the contrary, the court did not hold that any constitutional violation had taken place, an essential predicate for triggering the potential application of the exclusionary rule and a blanket suppression remedy. Finally, all of the documents the government seeks to introduce as evidence were found to have been properly seized. Under these circumstances, no court of appeals would have ordered blanket suppression, regardless of whether subjective intent is considered in the analysis.

2. Petitioner next contends (Pet. 14-20) that the court of appeals' decision conflicts with "this Court's decisions concerning the exclusionary rule." Pet. 14. That argument lacks merit and does not warrant this Court's review.

a. As an initial matter, to the extent this Court has considered the "flagrant disregard" doctrine, it has indicated that blanket suppression is appropriate only when "officers exceeded the scope of the warrant in the places searched," not when they exceed it in terms of the items seized. *Waller*, 467 U.S. at 43 n.3. In *Waller*, the Court

responded to petitioners' argument that evidence should be suppressed because the police had "flagrantly disregarded the scope of the warrants in conducting the seizure" by referencing *Heldt* and *Rettig* and noting that "[p]etitioners do not assert that the officers exceeded the scope of the warrant in the places searched." *Ibid.* The Court then found that only those items "unlawfully seized" were subject to exclusion. *Ibid.*

Based on the Court's statements in *Waller*, two courts of appeals have concluded that "an officer flagrantly disregards the limitations of a warrant only where he exceeds the scope of the warrant *in the places searched* (rather than the items seized)." *Garcia*, 496 F.3d at 507 (internal quotations marks omitted); *United States* v. *Decker*, 956 F.2d 773, 779 (8th Cir. 1992). Even if the Court's approach in *Waller* did not establish the outer boundaries of the flagrant disregard doctrine, see Pet. 15, the court of appeals' decision here is, at the very least, entirely consistent with the Court's ruling in that case.

b. Even assuming that the flagrant disregard doctrine has application in the context of excessive seizures, the court of appeals' decision does not conflict with this Court's decisions concerning the exclusionary rule.

This Court has repeatedly recognized that the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, and thereby allowing culpable defendants to go free. See, *e.g.*, *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 (1998); *United States* v. *Payner*, 447 U.S. 727, 734 (1980); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). Given the "rule's 'costly toll' upon truth-seeking," this Court has cautioned that "[s]uppression of evidence" should be a "last resort," not

a "first impulse." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006); *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009). The Court has also emphasized that the exclusionary rule is a "remedial device," and that its application has therefore been "restricted to those instances where its remedial objectives are thought most efficaciously served." *Arizona* v. *Evans*, 514 U.S. 1, 11 (1995).

In light of those concerns, total suppression is not an appropriate remedy (if at all) unless the officers executing the search grossly exceeded the scope of the warrant. And blanket suppression is surely unacceptable when, as is the case here, a court has not found there to be a constitutional violation in the first place. See p. 18, *supra* (quoting *Scott* v. *United States*, 436 U.S. at 135-136). Accordingly, the court of appeals correctly concluded that blanket suppression, particularly when the only evidence to be introduced at trial was properly seized, was not justified here.

c. Petitioner also contends that the court of appeals erred by holding that "the subjective views of [Agent Marrero] were not relevant in determining the applicability of the flagrant disregard doctrine." Pet. 16 (internal quotation marks omitted). Petitioner's argument is misplaced. Although the court of appeals did hold that the "subjective views of Agent Marrero were not relevant," it did so in the context of determining that "the actions of the executing officers [were] objectively reasonable and within the ambit of [the] warrants"—a context that was undeniably proper—not in formulating a remedy for a constitutional violation. Pet. App. 29a. Indeed, there was no finding by the court of appeals that the scope of the warrants was exceeded, much less that the searches were conducted in a "flagrant" manner. Because the court of appeals found there to be no under-

lying constitutional violation, it did not need to address whether an officer's subjective intent is relevant to the question of appropriate remedy. *Ibid.* (citing *Maryland* v. *Macon*, 472 U.S. 463, 470 (1985)). Therefore, the question of whether, or to what extent, an officer's subjective intent plays a role in determining the potential exclusion of evidence is not presented by this case. Furthermore, even if an executing agent's subjective motivations were relevant, blanket suppression would not be appropriate here given that the officers did not grossly exceed the scope of the warrants, but instead seized personal financial records in accordance with the warrants' authorization.[7] See, *e.g.*, *Liu*, 239 F.3d at 141-142 (holding that the officers' intent was irrelevant to the exclusion inquiry where the "officers did not 'grossly exceed' the terms of the warrant").

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[7] Petitioner also argues (Pet. 19-20) that the court of appeals erred by "failing to engage in any inquiry concerning the overbreadth of the searches." Pet. 19. That contention is incorrect. As noted above, the court of appeals determined that, in light of its interpretation of the warrants, its holding "substantially undercut[]" the district court's determination that the officers grossly exceeded the scope of the warrants. Pet. App. 28a-29a. The court of appeals also held, without challenge from petitioner here, that the mere fact that property seized pursuant to a valid warrant was voluntarily returned "does not give rise to an adverse inference or tend to establish that the initial seizure was unconstitutional." *Id.* at 30a n.20. Based on those two observations, it is evident that the court of appeals rejected the notion that the searches conducted here were substantially overbroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

No. 08-1152

In the Supreme Court of the United States

PRADEEP SRIVASTAVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition is as noteworthy for what it does not say as for what it does. The government does not dispute that there is a substantial conflict among the federal courts of appeals (and state courts of last resort) concerning the validity and application of the "flagrant disregard" doctrine. Nor does the government dispute that the question presented in this case is a recurring one of great importance in the administration of the exclusionary rule. Instead, the government devotes almost its entire brief to the contention that this case is a poor vehicle for addressing the question presented, and resolving the circuit conflict, because the court of appeals determined that there was no Fourth Amendment violation of any kind. That contention plainly lacks merit—and, once that contention is put

to one side, there is no valid reason for denying review here. Because the court of appeals' reasoning in this case was seriously flawed and its decision conflicts with the decisions of several other circuits, the petition for certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

1. The government does not challenge the proposition that "the courts of appeals have adopted varying approaches to the 'flagrant disregard' doctrine and the relevance of an executing officer's subjective intent to that analysis." Br. in Opp. 15. That implicit concession is a wise one, because there is a deep and substantial conflict—involving decisions from all of the federal courts of appeals with jurisdiction over criminal matters—as to the relevance of officers' subjective views for purposes of determining whether the officers acted with "flagrant disregard" for the terms of the warrant (and thus whether blanket suppression is required under the exclusionary rule).

As explained at greater length in the petition, the cases fall into four discrete categories. See Pet. 8-14. Three circuits—the District of Columbia, Ninth, and Tenth—have explicitly considered officers' state of mind in determining the applicability of the "flagrant disregard" doctrine. That category includes all of the court of appeals decisions that have ordered the blanket suppression of evidence under the "flagrant disregard" doctrine—the very decisions on which the government urges the Court to focus. See *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States* v. *Foster*, 100 F.3d 846, 850 (10th Cir. 1996); *United States* v. *Medlin*, 842 F.3d 1194, 1199-1200 (10th Cir. 1988). By contrast, like the Fourth Circuit in this case, three other

circuits—the Third, Sixth, and Eighth—have looked only to objective factors, without reference to officers' actual state of mind, in applying the "flagrant disregard" doctrine. Three circuits—the First, Second, and the Eleventh—either have expressly left open the relevance of officers' state of mind or have taken ambiguous positions on the issue. And two other circuits—the Fifth and Seventh—have gone furthest and refused to recognize the "blanket disregard" doctrine at all.

Remarkably, the resulting conflict implicates decisions written by no fewer than three current members of this Court while serving on lower courts—including then-Judge Kennedy's opinion in *Rettig*, the foundational decision for the development of the "flagrant disregard" doctrine. See *Rettig*, 589 F.2d at 418 (Kennedy, J.); *State* v. *Valenzuela*, 536 A.2d 1252 (1987) (Souter, J.), cert. denied, 485 U.S. 1008 (1988); *United States* v. *Young*, 877 F.2d 1099 (1st Cir. 1989) (Breyer, J.). There can be no doubt that such a mature conflict, on an important aspect of the exclusionary rule, warrants this Court's review.

2. In its brief in opposition, the government primarily contends that the decision below does not implicate the foregoing circuit conflict, on the ground that "the court of appeals found there to be no underlying constitutional violation." Br. in Opp. 22. That contention plainly lacks merit.

a. As a preliminary matter, it is beyond dispute that the executing officers in this case seized items that were not covered by the warrants (and thereby violated the Fourth Amendment). As the court of appeals recognized, the officers seized, *inter alia*, papers concerning petitioner's summer home, petitioner's wallet, his credit cards, a CVS Pharmacy loyalty card, and some foreign currency. See Pet. App. 7a-8a. And to take but a few of

the most egregious other examples, the officers also seized an invitation to a cultural event, an American Automobile Association card, and various uncashed or unwritten checks. See *id.* at 54a n.15, 55a n.16. None of those items could even arguably fall within the scope of the warrants, which authorized the seizure only of "[f]inancial records" (or other enumerated types of records) "related to the business of [petitioner] * * * which may constitute evidence of violations of [18 U.S.C. 1347]." *Id.* at 5a & n.4. It is telling that, while the government takes great pains to characterize *what the court of appeals said* about the existence of a constitutional violation, the government did not deny below, and does not deny here, that a constitutional violation *actually took place*—and, indeed, all but concedes that it did. See, *e.g.*, Br. in Opp. 17 (stating only that *some* of the seized items "actually fell squarely within the warrants' terms").

Rather than denying that a constitutional violation actually occurred, the government contends that "the court of appeals found there to be no underlying constitutional violation," Br. in Opp. 22—or, putting it slightly differently, that "the court [of appeals] did not hold that any constitutional violation had taken place," *id.* at 19. As a logical matter, however, the government's characterization of the court of appeals' decision simply cannot be correct. If the court of appeals had really concluded that no Fourth Amendment violation had taken place, it would not have needed to engage in *any* analysis of the "flagrant disregard" doctrine, much less the extended analysis in which it did engage. See Pet. App. 28a-30a. That is because the whole premise of the "flagrant disregard" doctrine (as the government recognizes, see Br. in Opp. 14) is that it is sometimes necessary to suppress even properly seized items where the seizure of *other*

items was improper; absent the improper seizure of at least some items, blanket suppression is plainly inappropriate. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1260 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982). The court of appeals thus evidently operated on the assumption that the officers had seized at least some items not covered by the warrants—and, for that reason, that the "flagrant disregard" doctrine was potentially triggered here.

b. Notwithstanding the incontestable fact that the officers had seized items outside the scope of the warrants, the court of appeals held that the "flagrant disregard" doctrine was inapplicable on the ground that "the subjective views of [the supervising officer] were not relevant" to the analysis. Pet. App. 29a. In so ruling, the court of appeals deepened a conflict with at least three other circuits (and one state court of last resort) holding that an officer's state of mind is relevant in applying the "flagrant disregard" doctrine. See p. 2, *supra*; Pet. 9-11.

The government does not dispute that such a holding would implicate a circuit conflict worthy of this Court's review. Instead, the government contends (Br. in Opp. 21) that the court of appeals did not actually hold that an officer's state of mind was irrelevant to the question whether the suppression of evidence was warranted under the exclusionary rule, but instead held only that it was irrelevant to the question whether a constitutional violation had occurred in the first place. That is a conspicuous misreading of the court of appeals' opinion. See, *e.g.*, Pet. App. 30a (stating that "[Agent Marrero's] personal opinions were an improper basis *for the blanket suppression ruling*") (emphasis added). In holding that an officer's state of mind was irrelevant to the *exclusionary-rule* inquiry, the court of appeals did cite this Court's decision in *Maryland* v. *Macon*, 472 U.S. 463

(1985), which reiterated the settled proposition that an officer's state of mind is irrelevant to the *constitutional* inquiry. See Pet. App. 29a.[1] In so doing, however, the court of appeals erroneously conflated the two inquiries, and ignored a whole line of this Court's cases (which the government likewise ignores here) making clear that "the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule." *Scott* v. *United States*, 436 U.S. 128, 139 n.13 (1978); see Pet. 16-18 (citing other cases).

For present purposes, the critical point is that the court of appeals ultimately held (in disagreement with the district court) that an officer's state of mind is irrelevant in applying the "flagrant disregard" doctrine—and thereby discounted the district court's finding, based on the supervising officer's "astonishing" testimony, that the officer "belie[ved] that the limiting words of the warrant were meaningless to him." Pet. App. 50a-51a, 53a-54a. The court of appeals' decision thereby implicates a circuit conflict that merits this Court's review.

c. The government suggests that, even if the court of appeals did recognize that the officers had unconstitutionally seized some items, it "did not find that the executing officers had *grossly* exceeded the scope of their search." Br. in Opp. 19 (emphasis added). That may be true, but it misses the point. The district court expressly found that "the executing agents grossly exceeded the scope of the search warrants," Pet. App. 55a, and the court of appeals ultimately did not disturb that finding. To be sure, the court of appeals did hold, in disagree-

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[1] The court of appeals' error was hardly surprising, because the government had made the same error in its brief to that court. See Gov't C.A. Br. 31, 36-37.

ment with the district court, that the documents the government was planning to introduce at trial fell within the scope of the warrant, see *id.* at 19a-27a,[2] and it proceeded to state that its holding "substantially undercut[] the [district court's] blanket suppression ruling," *id.* at 29a. Critically, however, the court of appeals failed independently to analyze whether, even absent those documents, the executing officers had seized a substantial volume of items not covered by the warrants. If it had done so, it surely would have concluded that, even without the documents the government was planning to introduce, the officers had still "grossly exceeded" the scope of the warrants—as the district court evidently did in holding that blanket suppression was required *regardless whether the documents at issue were properly seized.* See, *e.g.*, *id.* at 49a, 90a.[3]

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[2] The government contends that suppression is particularly unwarranted here because "each document or record the government seeks to introduce as evidence at trial was held to be properly seized pursuant to the search warrants." Br. in Opp. 18. That is a perplexing contention, because the whole point of the "flagrant disregard" doctrine is that it mandates suppression even when the items the government seeks to introduce were properly seized. See pp. 4-5, *supra*. If the items in question had been improperly seized, there would be no need to get into the "flagrant disregard" doctrine at all; the items would simply be suppressed through a routine application of the exclusionary rule.

[3] The government states that the documents it was planning to introduce at trial constituted "the bulk of the records identified by the district court as exceeding the warrants' scope." Br. in Opp. 17. The government, however, provides no support for that proposition. And there is ample reason to doubt it, because, in response to a complaint by petitioner's counsel that the executing officers had seized items outside the warrants' scope, the government returned *twelve boxes* of items to petitioner. See Pet. App. 54a n.15, 55a, 90a. Contrary to the government's suggestion (Br. in Opp. 22 n.7), the

To the extent that some courts have looked only to objective factors in applying the "flagrant disregard" doctrine, therefore, the court of appeals went even further than those courts, and compounded its error in discounting the relevance of intent, by failing to engage in any meaningful inquiry concerning the objective overbreadth of the searches. For that additional reason, the Fourth Circuit's decision warrants this Court's review.

B. The Question Presented Is An Important One That Merits The Court's Review In This Case

1. At most, the question presented in this case—*i.e.*, whether blanket suppression is appropriate where officers believed that limitations in a search warrant were meaningless and seized a substantial volume of items not covered by the warrant—is one that this Court's prior decisions have left open. In *Waller* v. *Georgia*, 467 U.S. 39 (1984), this Court acknowledged the existence of the "flagrant disregard" doctrine, but did not definitively resolve any question concerning that doctrine's validity or scope. See *id.* at 43 n.3.

The government suggests that *Waller* stands for the proposition that, under the "flagrant disregard" doctrine, "blanket suppression is appropriate only when officers exceed[] the scope of the warrant in the *places searched*, not when they exceed it in terms of the *items seized*." Br. in Opp. 19 (emphases added; internal quotation marks and citation omitted). It is true, as the government notes (*id.* at 20), that two courts of appeals have so interpreted *Waller*, and limited the "flagrant disregard" doctrine to circumstances in which officers search places not authorized in the warrant. See *United States*

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volume of returned items alone creates a strong inference that the overbreadth of the searches was substantial.

v. *Garcia*, 496 F.3d 495, 507 (6th Cir. 2007); *United States* v. *Decker*, 956 F.2d 773, 779 (8th Cir. 1992). That interpretation of *Waller*, however, cannot be reconciled with the text of the Fourth Amendment, which prohibits searches of unauthorized places and seizures of unauthorized items alike. Nor can it be reconciled with *Waller* itself, which approvingly cites the decisions in *Rettig* and *Heldt*—decisions indicating that blanket suppression would be appropriate where officers act with "flagrant disregard" for the terms of the warrant *with regard to the items seized*. See *Heldt*, 668 F.2d at 1266-1269; *Rettig*, 589 F.2d at 423. Accordingly, at least one court of appeals has expressly interpreted *Waller* to sanction application of the "flagrant disregard" doctrine to cases involving seizures of unauthorized items, as well as searches of unauthorized places. See *Medlin*, 842 F.2d at 1198-1199. Insofar as there is any uncertainty about the correct interpretation of *Waller*, that uncertainty counsels in favor of, not against, further review here.

2. The government does not dispute that the question presented in this case is a recurring one of great importance in the administration of the exclusionary rule. Nor could it, in light of the innumerable (and irreconcilable) cases in the lower federal and state courts concerning the validity and application of the "flagrant disregard" doctrine. See Pet. 20. Indeed, the government goes so far as to hint that it believes the "flagrant disregard" doctrine should be abrogated altogether—a position that, if sincerely held, further illustrates the need for this Court's review. See Br. in Opp. 21 (stating that "total suppression is not an appropriate remedy (*if at all*) unless the officers executing the search grossly exceeded the scope of the warrant") (emphasis added).

3. Finally, this case is an optimal vehicle in which to clarify the standards for invocation of the "flagrant disregard" doctrine. The government suggests (Br. in Opp. 11-12) that the mere fact that this case arises in an interlocutory posture provides a sufficient basis for denying certiorari. While it is true that a defendant does not ordinarily have a right of interlocutory appeal where a district court denies a motion to suppress in the first instance, see, *e.g.*, *United States* v. *Williams*, 413 F.3d 347, 354 (3d Cir. 2005), it was *the government* that initiated interlocutory review of the district court's order *granting* suppression in this case, by pursuing an appeal under 18 U.S.C. 3731. In so doing, the government was required to (and did) certify that "the appeal [was] not taken for the purpose of delay and that the evidence [was] a substantial proof of a fact material in the proceeding." *Ibid.* Once an interlocutory appeal has been commenced, it would be artificial (and inequitable) to terminate the appeals process as soon as the government obtains a favorable decision before the court of appeals, without allowing a defendant to litigate the issue to its natural conclusion before this Court.[4]

In any event, the interlocutory posture of a case is not a categorical bar to this Court's review; instead, the Court weighs prudential considerations in determining whether to review a case despite its interlocutory status. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007) (citing cases). And to the extent the Court does so here, those prudential considerations counsel strongly in favor of further review. This

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[4] By the government's logic, a defendant would seemingly be precluded even from seeking rehearing in the court of appeals once the panel issues a decision in the government's favor. That cannot be correct.

case presents a clean legal question; additional proceedings on remand will not develop the factual record pertinent to that question; and resolving that question in petitioner's favor will surely bring proceedings in this case to an end, because the government does not dispute that, without the tax returns and other tax-related documents at issue, it will be unable to proceed with petitioner's prosecution for tax fraud and evasion. There is no point in requiring petitioner to endure the burden and expense of a criminal trial (and to take a plainly futile appeal) before seeking this Court's review on a question of such obvious importance. The circuit conflict on that question, implicitly recognized by the government, warrants resolution in this case—and it warrants resolution now.

* * * * *

The petition for a writ of certiorari should be granted.

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